



JOINT HEARING BEFORE

**THE COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON SOCIAL SECURITY**

AND

**THE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE COURTS, COMMERCIAL AND ADMINISTRATIVE LAW**

UNITED STATES HOUSE OF REPRESENTATIVES

JULY 11, 2011

**STATEMENT
OF
MICHAEL J. ASTRUE
COMMISSIONER
SOCIAL SECURITY ADMINISTRATION**

Introduction

Chairmen, Ranking Members, and Members of the Subcommittees:

Thank you for this opportunity to discuss administrative law judge (ALJ) performance.

For over 75 years, Social Security has touched the lives of virtually every American, whether it is after the loss of a loved one, at the onset of disability, or during the transition from work to retirement. Our programs provide a social safety net for the public and contribute to the increased financial security for the elderly and disabled. Each month, we pay more than \$60 billion in benefits to almost 60 million beneficiaries. These benefits provide not only a lifeline to our beneficiaries and their families, but also are vital to the Nation's economy.

The Supreme Court has recognized that we are “probably the largest adjudicative agency in the western world.”¹ In fiscal year (FY) 2007, we completed 547,951 hearings. In FYs 2008 and 2009, we completed 575,380 and 660,842, respectively. Last fiscal year, we completed 737,616 hearings, and, we expect to complete 832,000 this fiscal year. We rely on over 1,400 ALJs to issue impartial, legally sufficient, and timely hearing decisions.

Let me emphasize that the vast majority of the ALJs hearing Social Security appeals do an admirable job. They handle very complex cases, while conforming to the highest standards in judicial conduct, which has been critical to our success in reducing the hearings backlog. When I first testified before the Social Security Subcommittee on my second day as Commissioner in 2007, our backlog situation was bleak. Backlogs had risen steadily throughout the decade, and the reform initiative I inherited, known as Disability Service Improvement or DSI, was aggravating the problem rather than helping it. We took swift action to end the failures of DSI and to accelerate its few successes. Then we went to work to manage our hearings operations’ nearly ten thousand employees with unprecedented rigor.

As a result, we have reduced the time for deciding a hearing request from an average of 532 days in February 2008 to 353 days last month. We have achieved this success despite recent budget constraints, which forced us to forego opening

¹ *Heckler v. Campbell*, 461 U.S. 458, 461 n.2 (1983).

eight planned new hearing offices, and the receipt of almost 1.5 million more applications for benefits due to the economic downturn.

The improved productivity of our ALJ corps and hundreds of small but important initiatives—including improved as well as new systems for management information, uniform business processes, smarter use of support staff, better training, more efficient allocation of resources, and development of decisional templates—have steadily brought us close to our original goal of 270 days to decide a case. With sustained and adequate funding from Congress, we will reach that goal in 2013.

History of Our ALJ Corps

We have over 70 years of experience in administering the hearings process. Since the passage of the Social Security Amendments of 1939, the Social Security Act (Act) has required us to hold hearings to determine the rights of individuals to old age and survivors' insurance benefits. Initially, "referees" under the direction of the Appeals Council held hearings and issued decisions. Later, after Congress passed the Administrative Procedure Act (APA) in 1946, we began using "hearing examiners" (now known as ALJs) to hold hearings and issue the decisions based on the evidence adduced at those hearings.

Over the years, the size of our ALJ corps has grown in correlation to our workloads. To address the backlog crisis and keep pace with demand, between 2008 and 2010, we increased our ALJ corps by over 300 judges. As of June 2011, we employed 1,407 full and part-time ALJs. This year, we plan to hire additional ALJs to address our still growing receipts. These new ALJs will bring our corps to over 1,500. Although it will take some time before our new hires are fully proficient in their jobs, I am pleased with their progress and confident that they will meet the highest professional and ethical standards.

The ALJ's Role in Our Administrative Process

Before continuing, let me briefly describe where the ALJs fit within our appeals process. A claimant who is dissatisfied with our initial determination may request reconsideration of the claim within 60 days of receipt of the notice of the initial determination. A claimant who disagrees with the reconsideration determination may request a hearing before an ALJ within 60 days of receipt of the

reconsideration notice.² A claimant who disagrees with the ALJ's decision may request review by our Appeals Council within 60 days of receipt of the ALJ's hearing decision. Finally, claimants dissatisfied with our final decision may appeal to the appropriate U.S. District Court.

When we receive a hearing request, if the evidence in the record is sufficient to establish disability, an ALJ or attorney advisor may issue an on-the-record, fully favorable decision without holding a hearing.³ If there is a hearing, the ALJ serves as both fact-finder and decision-maker. The ALJ gathers evidence and calls vocational and medical experts, as needed. The ALJ administers the oath or affirmation to witnesses. The hearing is a non-adversarial proceeding; the agency is not represented at the hearing.

Following the hearing, the ALJ may take post-hearing development steps to complete the record, such as ordering a consultative examination. The ALJ considers all of the evidence in the file when making a decision, including newly submitted evidence and hearing testimony and decides the case based on a preponderance of the evidence. The ALJ decides the case *de novo*; he or she is not bound by the determinations made at the initial or reconsideration levels. If the claimant does not appeal, the ALJ's decision becomes the final decision of the agency. A claimant who disagrees with the ALJ's decision may request review of the decision by the Appeals Council. The Appeals Council also retains the authority to review any ALJ decision on its own motion.

Eliminating the Hearings Backlog

Eliminating our hearings backlog and preventing its recurrence remains our number one priority. With Congress' help, we have attacked the backlog and made incredible progress over the last four years, despite a 22 percent increase in hearing requests from FY 2008 to FY 2010. Most importantly, we cut the national average time that claimants wait for a hearing decision by one-third.

Recently, a report from the Transactional Records Access Clearinghouse (TRAC) concluded that our hearings backlog reduction efforts are "faltering" due to a rise in the number of pending hearings. TRAC's analysis is sloppy and irresponsible.

² In 10 States, we are conducting a test that eliminates the reconsideration step and allows claimants to appeal their initial determinations to an ALJ.

³ Most of our hearings focus on the issue of whether a claimant is disabled, so we will describe the disability process in this discussion. The administrative process is similar for all of the programs that we administer.

TRAC's focus on the number of pending hearings is a flawed measurement of our improving service and bears little relevance to the public's experience. What matters most to someone waiting for a decision is how quickly we decide his or her case, not how many other people are also waiting for a hearing.

Due to the economic downturn and the aging of the baby boomers, our workloads have been skyrocketing. We received 130,000 more hearing requests in 2010 than we received in 2008, and we expect to receive 114,000 more requests in FY 2011 than we did in FY 2010. Without our hearing backlog reduction plan, our national average processing time would be approaching at least 600 days, and we would be well on our way to 1 million people waiting for a decision.

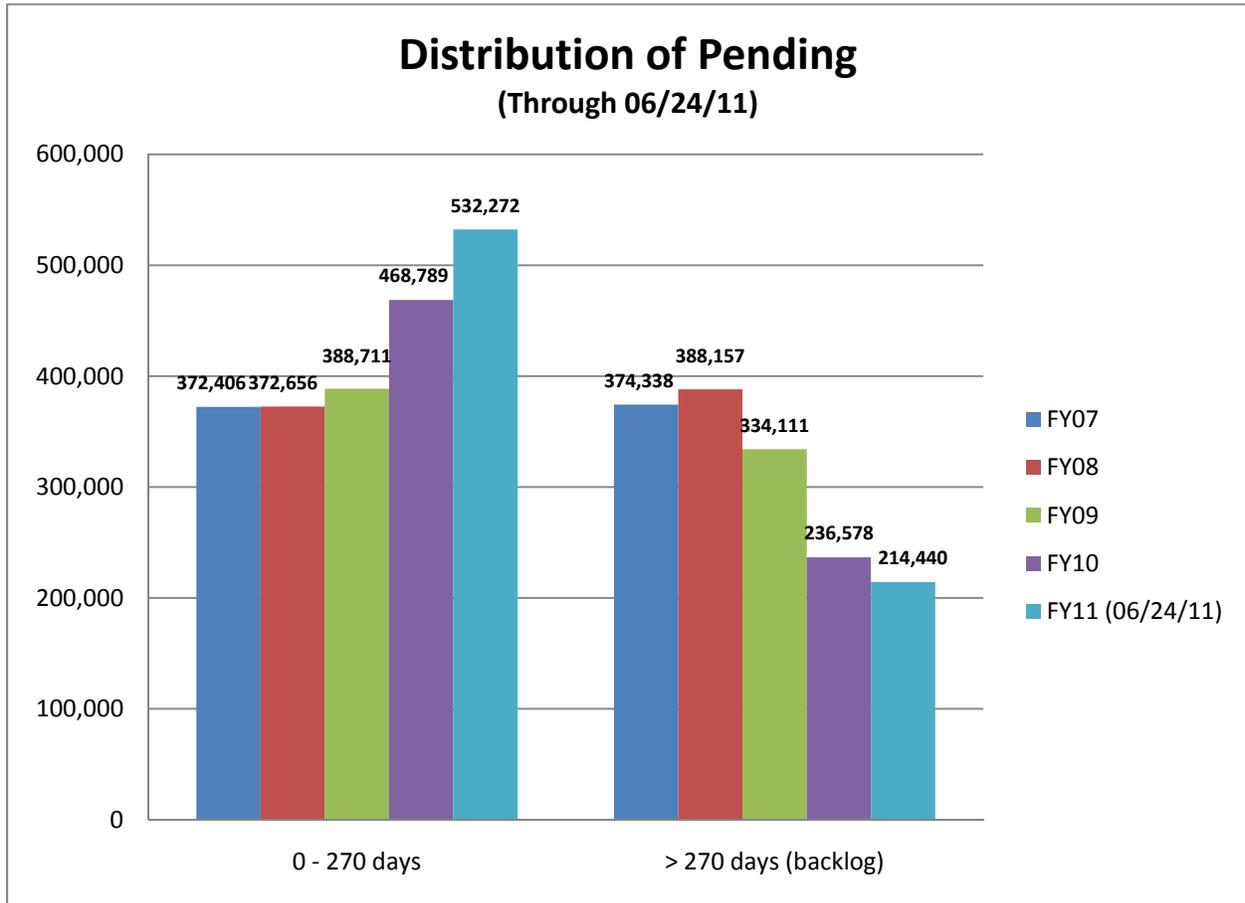
Thankfully, sound planning and our employees' hard work have prevented this scenario from unfolding. Despite the increase in hearing requests, we have steadily improved service by deciding more cases and deciding them consistently.

We started with the most morally urgent part of the backlog—the oldest, most complex cases. In 2007, we had claimants who waited for a hearing decision for as long as a staggering 1,400 days. Since 2007, we have decided over a half million of the oldest cases. By the end of FY 2010, we had virtually no cases pending longer than 825 days. This year, we are focusing on the cases that are 775 days or older, and, so far, we have decided over 95 percent of them.

We created National Hearing Centers (NHC) to provide immediate help for our most stressed offices. The ALJs in the NHCs hold hearings remotely using video conferencing equipment, providing us the flexibility to better balance pending workloads across the country. In July 2010, we opened our fifth NHC in St. Louis, Missouri, in addition to our Falls Church, Virginia; Albuquerque, New Mexico; Chicago, Illinois; and Baltimore, Maryland sites. In FY 2010, the five NHCs made a total of 22,760 dispositions. In FY 2011 through June, the NHCs have already made 24,735 dispositions.

In addition, we opened National Case Assistance Centers (NCAC) in two locations—McLean, VA in June 2010 and St. Louis, MO in July 2010. The NCACs provide increased adjudicatory capacity and efficiency by assisting the NHCs, the Appeals Council, and our Office of Appellate Operations with case processing. To date, the NCACs have written 7,556 decisions; prepared 14,238 electronic cases and 753 non-disability paper cases for hearings; and written or recommended 2,491 decisions for the Appeals Council. Unfortunately, budget cuts require us to close the McLean NCAC shortly.

We expect that once we eliminate the backlog, we will be able to decide hearings in an average of 270 days, which we believe is the appropriate amount of time for us to ensure due process. In 2007, 50 percent of the pending hearing requests were older than 270 days. Today, only 29 percent of our cases are over 270 days, and that percentage continues to drop.



Our ALJs are doing their part to drive down the hearings backlog, and I am very pleased with their overall productivity. In October 2007, we announced our expectation that each ALJ issue 500 to 700 legally sufficient hearing dispositions each year.⁴ In FY 2007, only 46 percent of the ALJs nationwide decided at least 500 cases. In FY 2010, without any significant change in the allowance and denial rates, 74 percent of ALJs completed 500 or more dispositions⁵. On average, ALJs now complete 2.46 decisions per day, compared to 2.19 decisions per day in FY 2007. Assuming we receive the funding necessary to maintain adequate staff support, next fiscal year we expect a further increase in the number of ALJs who

⁴ Hearing dispositions include hearing decisions and dismissals.

⁵ A significant number of judges who are not meeting the standard are fairly close—another 34 percent decided 400-499 cases in FY 2010.

meet our dispositional expectation. This improvement is a testament to the ALJ corps' hard work and dedication to serving the American public.

However, to continue our progress, we need Congress' help. We must receive full funding of the FY 2012 President's Budget request. The Government Accountability Office validated our progress in July 2009, when it found that we have a 78 percent chance of meeting or exceeding our target date of 2013 to eliminate the backlog. Similarly, a report issued last month by our Inspector General concluded that, based on our projections and assuming adequate funding, we will be able to eliminate our hearing backlog. Unless Congress provides us with the President's Budget, we will not be able to meet Congress' goal and our commitment to the American public to eliminate the hearing backlog in 2013 although our margin for error is slim. The gains that we achieved will vanish. The additional funding we received in recent years was critical to achieving our success to date.

The ALJ Hiring Process

On my watch we have raised the standards for judicial selection, hiring people who we believe will take seriously their responsibility to the American public. The 685 judges we have hired since 2007 have been productive and respectful of the statute. We have not had a single significant case of inappropriate conduct by any of these new judges. Insistence on the highest possible standards in judicial conduct is a prudent investment for taxpayers, especially since these are lifetime appointments.

Budget permitting, we would like to hire 125 ALJs in September of FY 2012; however, we can only do so if we have the resources and an outstanding pool of applicants on OPM's ALJ register. This year, we will pay OPM about \$2.7 million for ALJ-related personnel services. OPM calculates this amount based on the number of ALJs employed, not the number of ALJs hired.

We depend on the OPM to provide us with a list of qualified ALJ candidates, and we enjoy a positive working relationship with OPM. OPM Director John Berry has been very sensitive to our needs and has worked very closely with us. I truly appreciate his efforts. We are encouraged by OPM's initiative to revise the ALJ examination process. For example, agencies use their ALJs in different ways, and we would benefit from agency-specific selection criteria, rather than the one-size-fits-all approach. Specifically, for our hearing process to operate efficiently, we need ALJs who can treat people with dignity and respect, be proficient at working

electronically, handle a high-volume workload, and make swift and sound decisions in a non-adversarial adjudications setting.

As part of its analysis, OPM should continue to engage the agencies who hire ALJs and some authoritative outside groups, such as the Administrative Conference of the United States and the American Bar Association, to incorporate their expertise in the examination refresh process. I would like to point out that the total number of Federal ALJs is 1,660 as of March 2011, and our corps currently represents about 85 percent of the Federal ALJ corps—we have the greatest stake in ensuring that the criteria and hiring process meet our needs.

ALJ Performance

While our ALJ corps has made great progress in its productivity, recent news stories have raised serious questions about a few ALJs and provoked constructive debate about an issue I have raised several times before Congress—the small number of judges who underperform or do not apply the statute fairly.

The Administration is open to exploring options for addressing these situations, if it is done in consultation with ALJs, other Federal agencies, and other stakeholders and mindful of the importance of preserving the decisional independence of these judges. Areas to explore could include examining statistical evidence showing very significant variation between the decisions of a small number of ALJs and the decisions of other agency ALJs (whether in the direction of approving or denying claims) and peer review by other ALJs.

Management Oversight

One of Congress' goals in passing the APA was to protect the due process rights of the public by ensuring that impartial adjudicators conduct agency hearings. Employing agencies are limited in their authority over ALJs, and Federal law precludes management from using many of the basic tools applicable to the vast majority of Federal employees. Specifically, OPM sets ALJs' salaries independent of agency recommendations or ratings. ALJs are exempt from performance appraisals, and they cannot receive monetary awards or periodic step increases based on performance. In addition, our authority to discipline ALJs is restricted by statute. We may take certain measures, such as counseling or issuing a reprimand, to address ALJ underperformance or misconduct. However, we cannot take stronger measures against an ALJ, such as removal or suspension, reduction in

grade or pay, or furlough for 30 days or less, unless the Merit Systems Protection Board (MSPB) finds that good cause exists.⁶

We support Congress' intent that ALJs act as independent adjudicators, and we respect the qualified decisional independence that is integral to that role. In fact, as noted above, we used independent examiners even before Congress passed the APA.

Both the courts⁷ and the Department of Justice's Office of Legal Counsel⁸ have opined that ALJs are subject to the agency on matters of law and policy. Nonetheless, the APA does not expressly state that ALJs must comply with the statute, regulations, or subregulatory policies and interpretations of law and policy articulated by their employing agencies.

We have taken affirmative steps to address egregiously underperforming ALJs. With the promulgation of our "time and place" regulation, we have eliminated arguable ambiguities regarding our authority to manage scheduling, and we have taken steps to ensure that judges are deciding neither too few nor too many cases. By management instruction, we are limiting assignment of new cases to no more than 1,200 cases annually.

Our Hearing Office Chief ALJs (HOCALJs) and Hearing Office Directors work together to identify workflow issues. If they identify an issue with respect to an ALJ, the HOCALJ discusses that issue with the judge to determine whether there are any impediments to moving the cases along in a timely fashion and advise the judge of steps needed to address the issue. If necessary, the Regional Chief ALJ and the Office of the Chief ALJ provide support and guidance.⁹

⁶ The MSPB makes this finding based on a record established after the ALJ has an opportunity for a hearing.

⁷ "An ALJ is a creature of statute and, as such, is subordinate to the Secretary in matters of policy and interpretation of law." *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir.) (citing *Mullen*, 800 F.2d at 540-41 n. 5 and *Association of Administrative Law Judges v. Heckler*, 594 F. Supp. 1132, 1141 (D.D.C. 1984)), *cert. denied*, 493 U.S. 812 (1989).

⁸ "Administrative law judges have no constitutionally based judicial power. . . . As such, ALJs are bound by all policy directives and rules promulgated by their agency, including the agency's interpretations of those policies and rules. . . . ALJs thus do not exercise the broadly independent authority of an Article III judge, but rather operate as subordinate executive branch officials who perform quasi-judicial functions within their agencies. In that capacity, they owe the same allegiance to the Secretary's policies and regulations as any other Department employee." *Authority of Education Department Administrative Law Judges in Conducting Hearings*, 14 Op. Off. Legal Counsel 1, 2 (1990).

⁹ Our managerial ALJs play a key role in ALJ performance. They provide guidance, counseling, and encouragement to our line ALJs. However, the current pay structure does not properly compensate them. For example, due to pay compression, a line ALJ in a Pennsylvania hearing office can earn as much as our Chief Administrative Law Judge. Furthermore, our leave rules limit the amount of annual leave an ALJ can carry over from one year to the next. These compensation rules discourage otherwise qualified ALJs from pursuing management positions, and the APA prevents us from changing those rules.

Generally, this process works. The vast majority of issues are resolved informally by hearing office management. When they are not, management has the authority to order an ALJ to take a certain action or explain his or her actions. ALJs rarely fail to comply with these orders. In those rare cases where the ALJ does not comply, we pursue disciplinary action. Our overarching goal is to provide quality service to those in need and instill that goal in all of our employees, including ALJs.

But what about the tiny fraction of ALJs who hear only a handful of cases or engage in misconduct? We need to figure out how to deal with these ALJs more vigorously. A few years ago, we had an ALJ in Georgia who failed to inform us, as required, that he was also working full-time for the Department of Defense. Another ALJ was arrested for committing domestic violence. We were able to remove these ALJs, but only after completing the lengthy MSPB disciplinary process that lasts several years.¹⁰ In each of these cases, the ALJs did not hear cases but received their full salary and benefits until the case was finally decided by the full MSPB. This is unacceptable to taxpayers and is a problem we should address. As previously stated, we are open to exploring all options to address these issues, while ensuring the qualified decisional independence of these judges.

Quality Initiatives

Our improved management information system and tools have allowed us to improve the accuracy of our hearing decisions. We track the issues the Appeals Council and the courts cite when they remand ALJ decisions back to the hearing level. Based on this information, we can identify for the regions and individual hearing offices the issues that are most likely to result in remands, such as improperly assessing a treating source opinion. We then provide specific training to our judges and decision writers on those issues, improving accuracy and reducing remand rates.

We established the Division of Quality (DQ) within the Appeals Council in September 2010 to annually review a computer-generated, statistically valid sample of non-appealed favorable hearing decisions and dismissals. We will use the comprehensive data and analysis that the DQ provides to effectively train

¹⁰ Since 2007, we have referred eight ALJs for removal to the MSPB. The full MSPB upheld our request for removal in four actions; one action remains under consideration by the full MSPB. The ALJs in the other three removal actions retired prior to the hearing. Since 2007, we have brought 24 suspensions before the MSPB; 17 were suspended; three either died or separated from SSA; and, four cases are currently pending.

hearing office staff and ALJs on specific issues and provide feedback to other agency components on policy guidance and litigation issues.

Again, I must emphasize that the vast majority of our ALJs are conscientious and hard-working judges who take their responsibility to the public very seriously. For these judges, we can rely on current agency measures including training to address any performance issues they may have.

Conclusion

Since becoming the Commissioner of Social Security, I have taken great interest in strengthening our ALJ corps. At the time of my arrival, there were only 1,066 ALJs on duty. Since then, I have increased the ALJ corps by nearly one-third—more than any other Commissioner in the past several decades. Simultaneously, I pursued a much more aggressive track than my predecessors did to address misconduct and performance. In many instances, we accomplished a great deal by simply establishing and communicating expectations for quantity and quality to our judges.

Working with the MSPB, in some cases we have had to take disciplinary action. During my tenure, the agency has taken almost 60 disciplinary actions against ALJs, which includes reprimands, suspensions, and removals. In addition, during my tenure, more ALJs have been removed or retired after charges were filed against them with the MSPB than under any other Commissioner.

The ALJ corps is at the heart of our hearing process, and one of the main reasons we have made significant progress in reducing the hearings backlog. However, this progress will be jeopardized without full funding of the President's FY 2012 budget request.

Let me reiterate that the vast majority of our ALJs are dedicated public servants who take their responsibilities seriously. However, for the very few ALJs who underperform or engage in actionable misconduct, there are limits on our ability to deal with such issues rapidly. We will work with Congress, OPM, the MSPB, and the ALJ union to ensure that our ALJ corps continues to provide the excellent service the American public deserves.

Mr. Chairman, I thank you for your continuing interest in this issue.