ROLE OF SOCIAL SECURITY ADMINISTRATIVE LAW JUDGES

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY

AND THE

SUBCOMMITTEE ON SOCIAL SECURITY

OF THE

COMMITTEE ON WAYS AND MEANS

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

JULY 11, 2011

Serial No. 112–67
(Committee on the Judiciary)

Serial No. 112–SS8
(Committee on Ways and Means)

Printed for the use of the Committee on the Judiciary and the Committee on Ways and Means

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

67–308 PDF WASHINGTON : 2012

For sale by the Superintendent of Documents, U.S. Government Printing Office
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ROLE OF SOCIAL SECURITY ADMINISTRATIVE LAW JUDGES

MONDAY, JULY 11, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS,
COMMERCIAL AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittees met, pursuant to call, at 3:30 p.m., in room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chairman of the Subcommittee on Courts, Commercial and Administrative Law, Committee on the Judiciary) presiding.

Members Present from the Subcommittee on Courts, Commercial and Administrative Law, Committee on the Judiciary: Representatives Coble, Gowdy, Ross, Johnson of Georgia, Watt, and Smith of Texas (ex officio).

Members Present from the Subcommittee on Social Security, Committee on Ways and Means: Johnson of Texas, Smith of Nebraska, and Becerra.

Staff Present from the Subcommittee on Courts, Commercial and Adminstrative Law, Committee on the Judiciary: (Majority) Daniel Flores, Subcommittee Chief Counsel; John Hilton, Counsel; Allison Rose, Professional Staff Member; Ashley Lewis, Clerk; and (Minority) Edward Salinas, Counsel.

Mr. COBLE. Good afternoon, ladies and gentlemen. The Subcommittee hearing on the "Role of Social Security Administrative Law Judges" will be convened. Good to have each of you here today. Let me give my opening statement here.

I think Mr. Johnson is on his way. Otherwise Mr. Becerra and Mr. Johnson are here. And the other Mr. Johnson from Georgia, I am told, is on his way down. I want to thank Sam Johnson for his leadership on this issue, thanks to the Chairman as well for his participation in this important hearing. Finally, I want to thank our witnesses for their testimony and for their attendance today.

On average Administrative Law Judges (ALJs) make $153,000 per year, including flexiplace provisions that allow them to work oftentimes from their homes. Becoming an ALJ is effectively an appointment for life on good behavior, comparable to an Article III Federal judge. An ALJ can be removed by misconduct by the Merit System Protection Board, but oftentimes this is a lengthy process. Meanwhile the ALJ will continue to earn his or her full salary. No doubt many, if not most ALJs are conscientious, hardworking people who process their dockets efficiently while giving each claimant

the full attention he or she deserves. Commissioner Astrue assures us of that fact.

But cases like the one recently reported from West Virginia starkly reveal how the near complete lack of accountability offers an abundance of chances for abuse. Meanwhile it is the claimants who suffer, not to mention the American taxpayer who, like always, gets stuck with the bill.

In addition to these larger questions of efficiency, accountability and professionalism in the Federal ALJ corps, there remains the issue of SSA's backlog. Although Commissioner Astrue assures us that SSA is making progress on discharging its backlog, he adds that this progress will be jeopardized without full funding from the President's fiscal year 2012 budget request.

Whenever we in the Congress confront a problem, we should ask if it can be resolved without adding to the Federal budget deficit. Instituting some kind of peer review among ALJs may well be one option to consider. Creating tiers, other than a career appointment would be another option that could be made available perhaps.

Improving the pool of applicants from which SSA has to choose when hiring ALJs also can go a long way, it seems to me, toward solving or resolving the problem. I am sure Deputy Director Griffin can speak to this issue and apprise the Subcommittees of specifically what steps OPM is taking or will take to address the issues raised in today's hearing.

I look forward to the witnesses' testimony and reserve the balance of my time. I am pleased to recognize the distinguished gentleman from Texas, Mr. Sam Johnson, for his opening statement.

Mr. JOHNSON OF TEXAS. Thank you, Mr. Chairman. I appreciate it. I am pleased to be cochairing this hearing with my colleague Howard Coble and his Subcommittee colleagues. And I thank you for hosting this important event.

The Social Security and Supplemental Security Income Disability programs are the largest of Federal programs that provide assistance to people with disabilities, both administered by the Social Security Administration, and only individuals who have a disability may qualify for benefits under either program. Social Security Disability Insurance pays benefits to workers and their families if they work long enough and recent enough, generally 10 years, 5 of which were in the last 10, and paid Social Security taxes. Supplemental Security Income, or SSI, pays benefits based on financial need and is funded by general revenue.

According to the CBO, over $123 billion in disability insurance benefits were paid to 10.2 million disabled workers and their families in 2010, though the current system makes it difficult, if not impossible to know if that is an accurate number of Americans who are truly disabled and truly deserving. Nonetheless, these are the numbers we have and CBO projects that by 2021 the number of beneficiaries will increase by close to 20 percent, to 12 million, and benefits will increase 57 percent to $193 billion.

In 2010, 6½ million disabled SSI recipients received $41.8 billion in benefits. By 2021 CBO projects 7.1 million disabled SSI recipients will receive $56 billion in benefits. Request for benefits have increased with the aging of the Baby Boomers and the recession, the latter suggesting that people in some cases file for disability

not because they are unable to work, but because they are unable to find work.

Since 2007, disability insurance awards have increased 18 percent to 1.1 million people in 2010, while SSI disability awards have increased 28 percent to 938,000. According to 2011 trustees report, disability program revenue will only cover 86 percent of the benefits in 2018.

At the center of Social Security's disability programs is the disability process that determines whether claimants are entitled to benefits. Pivotal to that process is a hearing before an administrative law judge, or ALJ, at which many of the difficult cases denied at early stages in the process are newly reconsidered and awarded benefits.

The Ways and Means Subcommittee on Security has long focused on ALJ and hearing office performance on a bipartisan basis. A September 2008 Subcommittee hearing highlighted the agency and agency's Inspector General's work to address hearing office and ALJ performance. Some progress has been made.

Commissioner Astrue, who is here today, has implemented close to 40 initiatives to boost adjudication capacity, improve performance and increase efficiency. Also agency hiring efforts have focused on increasing the number of ALJs and their support staff. The waiting time for a hearing decision has been reduced from a high of 500 days in August, 2008 to 350 days in June, 2011. Now 74 percent of ALJs are meeting their requested threshold of 500 decisions, up from 47 percent when the request was first made. The appeals processing statistics are posted online.

Now the public is rightly paying attention and raising questions about the integrity of the judges, and recent press articles have highlighted judges awarding benefits 90 percent or more of the time in comparison to a national average that hovers around 60 percent, judges who decide extremely high numbers of cases in comparison to their colleagues, awards that are made without a hearing based on whatever medical evidence may be in the file, disparities from office to office and State to State where an outcome can be predicted based on the ALJ assigned the case, and assignment of cases outside a random rotation, raises the specter of inappropriate relationships with counsel.

At the bipartisan request of this Subcommittee the agency's Inspector General is investigating the most egregious of these examples now. At a minimum these articles raise serious questions about the fundamental fairness of this appeal system.

Our Members have been provided copies of these press articles and, without objection, the articles will be inserted into the hearing.

[The information referred to follows:]

THE WALL STREET JOURNAL.
WSJ.com

U.S. NEWS

MAY 19, 2011

Disability-Claim Judge Has Trouble Saying 'No'

Near-Perfect Approval Record; Social-Security Program Strained

By DAMIAN PALETTA

HUNTINGTON, W.Va.—Americans seeking Social Security disability benefits will often appeal to one of 1,500 judges who help administer the program, where the odds of winning are slightly better than even. Unless, that is, they come in front of David B. Daugherty.

In the fiscal year that ended in September, the administrative law judge, who sits in the impoverished intersection of West Virginia, Kentucky and Ohio, decided 1,284 cases and awarded benefits in all but four. For the first six months of fiscal 2011, Mr. Daugherty approved payments in every one of his 729 decisions, according to the Social Security Administration.

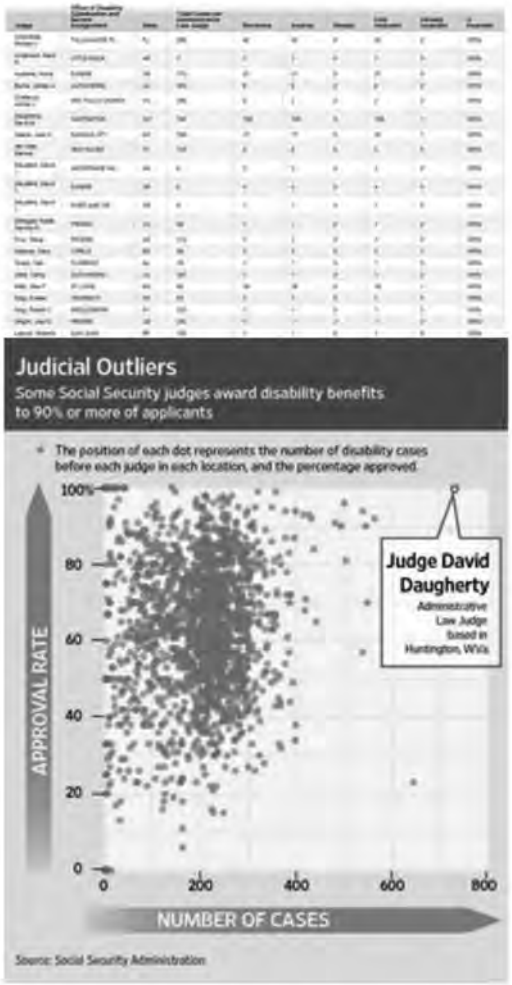
The judge has maintained his near-perfect record despite years of complaints from other judges and staff members. They say he awards benefits too generously and takes cases from other judges without their permission.

Staffers in the Huntington office say he hears a disproportionate number of cases filed by one area attorney. Mr. Daugherty has been known to hold hearings for as many as 20 of this lawyer's clients spaced 15 minutes apart.

Mr. Daugherty is a standout in a judicial system that has lost its way, say numerous current and former judges. Judges say their jobs can be arduous, protecting the sometimes divergent interests of the applicant and the taxpayer. Critics blame the Social Security Administration, which oversees the disability program, charging that it is more interested in clearing a giant backlog than ensuring deserving candidates get benefits. Under pressure to meet monthly goals, some judges decide cases without a hearing. Some rely on medical testimony provided by the claimant's attorney.

This breakdown is one reason why Social Security Disability Insurance—one of the federal government's two disability programs—is under severe financial strain. It paid a record $124 billion in benefits in 2010 and is on track to become the first major entitlement program to go bust. Government officials said last week it is expected to run out of money in 2018.

Social Security Disability Awards



The U.S. program's tribulations come as other countries are trying to limit the costs of their disability programs. In the U.K., officials have proposed requiring routine re-evaluations of people with disabilities to see if their conditions have changed. Australia has proposed that some beneficiaries participate in job-training programs, with the goal of eventually moving them off government support.

American applicants for disability benefits must first seek approval from state officials, who play a lead role in an initial review. Applicants twice denied can then appeal to one of the Social Security Administration's administrative law judges. The judges are appointed by the federal agency after a competitive exam and screening process.

Hearings, which aren't open to the public because of medical-privacy rules, typically last an hour and include either the judge or the applicant's attorney questioning the petitioner. Medical or employment experts can testify, too. Judges consider an applicant's health, age, education and job prospects before making a legally binding decision.

The average disability-benefit approval rate among all administrative judges is about 60% of cases. But there are Daugherty equivalents dotted across the country. In the first half of fiscal 2011, 27 judges awarded benefits 95% of the time, not counting those who heard just a handful of cases. More than 100 awarded benefits to 90% or more of applicants, according to agency statistics.

Mr. Daugherty, 75 years old, processes more cases than all but three judges in the U.S. He has a wry view of his less-generous peers. "Some of these judges act like it's their own damn money we're giving away," Mr. Daugherty told a fellow Huntington judge, Algernon Tinsley, who worked in the same office until last year, Mr. Tinsley recalled.

Judges and local attorneys have complained about the volume of disability cases brought before Judge Daugherty by one lawyer, Eric C. Conn.

Mr. Daugherty, in a written response to questions about the comment, said such a phrase is "more or less a standing joke" among disability-benefit review offices around the country. "No more, no less."

He said every decision he makes "is fully supported by relevant medical reports and physical and/or mental residual functionary capacity assessments from treating or examining doctors or other medical professionals."

When asked about Mr. Daugherty, Social Security Administration Commissioner Michael Astrue said in an interview there were several "outliers" among administrative law judges, but that he has no power to intervene because their independence is protected by federal law. Their appointments are lifetime.

"We mostly have a very productive judiciary that makes high-quality decisions, and we've got some outliers and we've done what we can," said Mr. Astrue. "Our hands are tied on some of the more extreme cases."

Social Security Administration officials acknowledge they are trying to clear a backlog of 730,000 cases. But they say they remain focused on ensuring taxpayer money isn't wasted. "We have an obligation to the people in need to provide them their benefits if they qualify, but we also have an obligation to the taxpayer not to give benefits to people who don't qualify," Mr. Astrue said.

Following inquiries from The Wall Street Journal, the Social Security Administration's inspector general's office launched an investigation into Mr. Daugherty's approval rate, according to several people briefed on the matter. Mr. Daugherty said he isn't aware of any investigation.

Judge Daugherty, left, an active member of the Huntington, W. Va., community, performed in a recent play.

Social Security, with an $800 billion annual budget, is one of the government's largest expenses, and is best known for sending monthly payments to retired Americans. But it also pays disability claims for 18 million people each year, with numbers pushed higher because of the recent recession. The federal government runs two separate programs to assist people unable to work because of a debilitating mental or physical disability.

For some, applying for benefits can be an agonizing process that takes more than two years. Benefits are modest—they can run around $1,000 a month—but come with access to government-run health plans Medicare and Medicaid. Analysts estimate the total package costs $300,000 over a beneficiary's lifetime.

To clear the backlog of cases, the Social Security Administration in 2008 pushed judges to move between 500 and 700 cases a year, something less than half of judges were managing at the time, according to Mr. Astrue, the commissioner. To compensate, judges began making many decisions "on the record," which means they grant benefits to applicants without meeting them, hearing testimony or asking questions, according to several judges. This has been a favorite approach for Mr. Daugherty, people who have worked with him say.

Mr. Daugherty doesn't dispute the characterization, and said in these circumstances he weighs "the evidence in the same manner as in cases requiring a hearing." He said the process "saves the agency a great deal of money and work hours."

The Social Security Administration "cares only about number of resolutions; quality is no longer a serious concern," James S. Bukes, a Pittsburgh administrative law judge, wrote in a recent letter to the House subcommittee that oversees Social Security. Mr. Bukes, who approved 46% of disability applicants through the first half of this fiscal year, said the system "wastes millions of dollars by granting claims that are not meritorious."

Mr. Daugherty became a Social Security judge in 1990 after serving as an elected Cabell County circuit court judge during he 1970s and 1980s. Born and raised in Huntington, he introduces himself as "D.B.," according to program notes for a recent local production of "Titanic: The Musical," in which Mr. Daugherty played John Jacob Astor. He's also a devotee of karaoke.

"He is a very, very well respected man in the community," said Nancy Cartmill, president of the Cabell County Commission. "He's been there for years."

In 2005, he reached 955 decisions, approving benefits in 90% of the cases. From 2006 through 2008, he decided 3,645 cases, approving benefits roughly 95% of the time. Last year, at 99.7%, he had one of the highest award rates in the country, and is on pace to award even more benefits in 2011, according to agency statistics.

As Mr. Daugherty's numbers rose, judges, staff and local attorneys began complaining about the volume of cases brought before the judge by one Kentucky lawyer.

The lawyer, Eric C. Conn, runs his Social Security practice out of a collection of connected mobile homes in Stanville, Ky., where he erected a giant statue of Abraham Lincoln in the parking lot. His smiling face adorns billboards up and down U.S. Highway 23, and his slogan is "he gets the job done." Mr. Conn hired Mr. Tinsley, the former Huntington judge, and promotes him on local billboards, too. Mr. Conn often brings an inflatable replica of himself to events. His website address is mrsocialsecurity.com.

Judges and staff in the Huntington office have complained to supervisors that Mr. Daugherty assigns himself Mr. Conn's cases, including some that were assigned to other judges, two former judges and several staff said. Cases are supposed to be assigned randomly.

According to a court schedule of Mr. Daugherty's day reviewed by The Wall Street Journal dated Feb. 22, 2006, Mr. Daugherty held 20 hearings spaced 15 minutes apart for Mr. Conn and his clients in a Prestonsburg, Ky., field office. Such days can be a bonanza for lawyers: The average fee for one approval is between $3,000 and $3,500 and can go as high as $6,000.

"The Conn situation was something we really harped on," said Jennifer Griffith, a master docket clerk in the office until she left in late 2007. "We made sure management knew about it. We gave them every chance to come up with some sort of logical explanation or to get it to stop, and that never happened."

Mr. Daugherty said he prefers a crammed timetable because he is dyslexic and must fit all of his hearings within four or five days each month because he "simply cannot spend that much time in the courtroom."

Holding hearings within just a few days "allows me sufficient time to review and prepare for hearings, resulting in full and complete knowledge of the documents in the case prior to hearing," he added.

Huntington's chief administrative judge, Charlie Andrus, said he was notified on four occasions of Mr. Daugherty either taking cases assigned to other judges or taking unassigned cases. Mr. Andrus said he issued a written directive on April 29 that "no case was to be reassigned between judges by anyone unless I gave specific permission."

Mr. Daugherty said he believed judges could take cases "so long as no other [administrative law judge] had seen or reviewed the file." He said he was "recently reminded that that is no longer true and I promptly returned the cases to the original assignees."

Stephen Sammons, 37, of Mavisdale, Va., said he injured his neck and back in a truck accident in 2001. He continued working until 2008 when the pain became unbearable, he said. He quit his job and filed for disability benefits.

Several doctors authorized by the Social Security Administration to look at his injuries disputed his claim that his condition was caused by the accident. He retained Mr. Conn, and the case ended up before Huntington judge Toby J. Buel Sr., who rejected the claim in February 2010.

Mr. Conn resubmitted Mr. Sammons' claim, and Mr. Sammons said he was surprised when Mr. Conn's office called and said he wouldn't have to appear before the judge and would only have to see a doctor, selected by Mr. Conn. The new medical records were filed to Mr. Daugherty, who approved the case without Mr. Sammons having to appear.

Mr. Daugherty declined to comment on the case.

A possible connection between Messrs. Daugherty and Conn is a subject of the inspector general's investigation, according to two people familiar with the probe. Neither Messrs. Conn or Daugherty have been accused of wrongdoing. Mr. Daugherty said he has "absolutely not" received anything of value from Mr. Conn or his associates for processing the lawyer's cases. He said he has denied a "goodly number" of Mr. Conn's cases over the years, though he couldn't provide a specific figure.

Mr. Conn declined multiple interview requests, and didn't respond specifically to written questions. In a statement, he said he had "not been contacted by any one indicating any investigation being conducted."

He added: "I have tried very hard in my 18 years of being a lawyer to represent my clients and the profession honestly and ethically seeking results based on the merits of my client's cases and the results that come from hard work and not from any improper conduct."

Some former judges and staff said one reason Mr. Daugherty was allowed to continue processing so many cases was because he single-handedly helped the office hit its monthly goals. Staff members can win bonuses and promotions if these goals are surpassed as part of performance reviews.

Dan Kemper, who began working as a judge in the Huntington office with Mr. Daugherty in 1990, said the Social Security agency's management refused to intervene because of the numbers Mr. Daugherty delivered

for the office. He said he complained for years about the number of cases Mr. Daugherty approved without interviewing applicants. Mr. Kemper, who was known in the area as "Denying Dan" for his relatively strict approach, retired in 2007 because he felt the system was unfair.

"The only way you could really get that many cases out was to grant them all, because it was so much easier," Mr. Kemper said.

In late April, the Huntington office held 50 of Mr. Daugherty's cases—all approvals for Mr. Conn's clients—so they could be processed in May, because the office had already hit their monthly goal, people familiar with the matter said. Those applicants will have to wait an additional month to receive benefits. Mr. Conn, who receives a percentage of the back pay owed to his clients, will collect more fees because of the delay. The Huntington office will get a head start on the next month's target.

Mr. Daugherty said cases are held to space out his approvals, which he attributed to "the 'numbers game' that most, if not all, federal agencies are subject to."

Mr. Andrus said cases weren't held to meet monthly numbers. He said Mr. Daugherty's cases can be held because other applicants might have been waiting longer for benefits and those cases might take priority.

In a brief telephone interview in April, Mr. Daugherty blamed high poverty rates especially in Eastern Kentucky for his large case load and high approval rate.

"People would really be surprised at how little education those people have," he said. "If they have a fourth-grade education, they couldn't get a job if their lives depended on it."

THE WALL STREET JOURNAL.
WSJ.com

U.S. NEWS

MAY 20, 2011

Disability Judge Spurs Benefits Investigation

By DAMIAN PALETTA

Investigators from the Social Security Administration's inspector general's office descended on Huntington, W.Va., on Thursday, the same day a Wall Street Journal front-page article detailed the high award rate of administrative law judge David B. Daugherty.

From Page One

Investigators interviewed a number of staff members in the Huntington Social Security Administration office and removed at least one computer, people familiar with the matter said.

At least two congressional probes are being launched or expanded as a result of the article, congressional aides said. Utah Sen. Orrin Hatch, the top Republican on the Senate Finance Committee, said he planned to look at how the agency grants disability claims. And the House Ways and Means Committee plans to broaden an existing investigation into how Social Security disability programs are administered.

"Taxpayers fund this essential safety net, and they have every right to be outraged," a committee spokeswoman said.

In addition to paying for senior retirement benefits, the Social Security Administration also administers two federal disability programs.

Mr. Daugherty, 75 years old, is one of about 1,500 administrative law judges who hear appeals from Americans to determine whether they qualify for federal disability benefits. Judges tend to approve about 60% of their cases, but Mr. Daugherty's award rates are much higher. In fiscal 2010, he approved benefits in 99.7% of his decisions. In the first six months of this fiscal year, he approved benefits in all 729 cases he decided. There are close to 100 judges who pay benefits in more than 90% of their decisions.

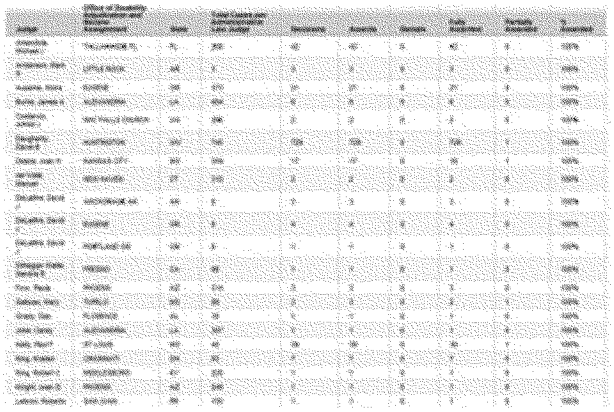
The investigation by the inspector general's office is being monitored by top Social Security Administration officials, people familiar with the matter said. Investigators are examining a number of issues, including the high percentage of cases Mr. Daugherty approved for a Kentucky lawyer named Eric C. Conn. Efforts to reach Mr. Conn on Thursday were unsuccessful.

"We are currently conducting multiple investigations and expect to take appropriate action before too long," a spokesman for the Social Security Administration said.

Efforts to reach Mr. Daugherty on Thursday were unsuccessful. In a previous written response to questions, he said he made his decisions based on medical evidence in line with government standards.

Rep. Nick J. Rahall, a Democrat whose district includes Huntington, said, "The Inspector General reportedly is looking into the matter to ensure that the review process is working as it should—from the Social Security Commissioner on down. The American people should expect nothing less."

Social Security Disability Awards



Millions of Americans who are unable to work because of mental or physical health issues depend on disability benefits. Critics have said the process for determining who qualifies is subjective and loosely monitored. The Social Security Administration has also been pressuring judges to speed up their processing to reduce a 730,000-case backlog.

There are two major disability-benefit programs, and the largest—Social Security Disability Insurance—has 10.2 million beneficiaries. The program has grown rapidly in recent years, which some judges and analysts attribute to the uneven way in which the system approves benefits as well as the recent deep recession. SSDI paid out $124 billion in benefits in 2010 and is projected to run out of funding in 2018 unless changes are made.

THE WALL STREET JOURNAL.
PROFESSIONAL EDITION WITH FACTIVA

March 25, 2011 from Factiva
Dow Jones Newswires

WSJ: Social Security Inspector General Dispatching Disability Fraud Team To Puerto Rico

By DAMIAN PALETTA

WASHINGTON--The Social Security Administration's inspector general is assembling a team of disability fraud investigators to send to Puerto Rico, following a front-page story in The Wall Street Journal Tuesday that revealed unevenness in the way disability benefits are awarded across the country.

The IG's office is dispatching a "Special Projects team of investigators to send to Puerto Rico to support our agents on the ground," an official said.

The team would work with officials from the Social Security Administration and set up something called a "cooperative disability investigative" unit. There are already 22 of these units, known as CDIs, in 19 U.S. states. Their investigations can probe people who may have fraudulently obtained benefits from the Social Security Disability Insurance program, among other things.

(This story and related background material will be available on The Wall Street Journal website, WSJ.com.)

The inspector general's office already had "several major investigations" in progress in Puerto Rico, the official said.

The Social Security Disability Insurance program has become one of the country's largest federal entitlement plans, paying out $124 billion in benefits in 2010. The number of people in the program has jumped in the last decade, growing from 6.6 million in 2000 to 10.2 million in 2010. Close to 500,000 people joined the program last year, more than any other year since the program was created in 1957. The program's spending has grown so rapidly that it is projected to run out of money in four to seven years unless Congress intervenes.

The federal program is designed to help people who have stopped working because of physical or mental health problems, and applicants must go through a lengthy process to

receive benefits. But the way the program is designed gives states and U.S. territories wide discretion to determine who qualifies. The Social Security Administration tries to enforce consistency, but several experts, doctors, and lawyers said there can be different interpretations on who meets the standards.

People have been pouring into the system across the country. The percentage of people accepted into the program in Puerto Rico has skyrocketed in the last five years, jumping from 36% approved on their initial application in 2006 to 63% in 2010. The biggest one-year jump was from 2008 to 2009, when the approval rate soared from 43.7% to 59.8%.

The inspector general's office operates as the SSA's chief watchdog and takes a lead role in law enforcement cases related to Social Security.

Social Security Administration spokesman Mark Lassiter said his agency requested the IG probe.

"We have worked with the Inspector General on a number of investigations in Puerto Rico in the past few years which have not revealed unique problems," he said in an email. "However, we have looked at recent statistical trends and asked the IG to work with us to make sure that these trends to not reflect an increase in fraud."

Before the Wall Street Journal story ran, Beatrice Disman, a top SSA official in New York who oversees the agency's operations in Puerto Rico, said the reason people were approved at a higher rate in Puerto Rico was because of high unemployment there and because the agency had recently added more examiners to help process claims. [03-25-11 1241ET]

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U.S. NEWS

MAY 27, 2011

Disability Judge Put On Leave From Post

By DAMIAN PALETTA

The Social Security Administration placed on leave an administrative law judge who has approved an unusually high number of applications for disability benefits, one week after a page one article in The Wall Street Journal detailed his decisions.

David B. Daugherty, based in Huntington, W. Va., awarded benefits in each of the 729 disability cases he decided in the first six months of fiscal 2011, according to government data.

On May 19, the day the Journal article appeared, a team from the agency's inspector general's office seized computers and interviewed employees from the West Virginia office.

Mr. Daugherty, who joined the agency as a judge in 1990, was escorted out of his office Thursday. In a phone interview several hours later, he said he had "no idea" why he was placed on leave, but said it would probably last until the investigation was complete. He said he would continue to be paid while on leave.

Judges are rarely removed from office, but they can be pushed out in extreme circumstances when supervisors believe it is necessary.

Social Security officials declined to comment on the case.

There are 1,500 administrative law judges who rule on disability cases in which applicants have been denied at least twice by Social Security. Judges award benefits roughly 60% of the time, according to government statistics, but some have much higher approval rates. In the first half of 2011, 27 judges awarded benefits 95% of the time, not including those with a handful of cases.

In the interview Thursday, Mr. Daugherty said it was "pretty much coincidence" that he approved all of the cases in the first six months of the year.

"Lawyers were just so extremely well-prepared, and the medical evidence was all there," he said.

He said the lawyers have "discovered the combination to the lock," meaning they have figured out how to bring cases to judges that are hard to deny.

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POLITICS

JUNE 9, 2011

Social Security Judge Steps Down From Post

By DAMIAN PALETTA

The chief Social Security Administration judge in Huntington, W.Va., has stepped down from his post, an agency official told employees Wednesday, broadening the fallout from a recent page-one Wall Street Journal article about the office.

The decision by Charlie Andrus, who became Huntington's chief judge in 1997, was voluntary, two people familiar with the matter said. Debra Bice, the acting national chief judge, told employees in Huntington he would remain with the agency as a judge, the people said.

Mr. Andrus's decision comes two weeks after the Social Security Administration placed another judge in Huntington, David B. Daugherty, on indefinite administrative leave pending an investigation into the office. Mr. Daugherty has denied any wrongdoing.

On May 19, the Journal reported that Mr. Daugherty had awarded federal disability benefits in each of the 729 decisions he reached in the first six months of fiscal 2011. The national average for judges is about 60%. Mr. Daugherty's numbers were high both in the percentage of cases approved and in the large number of cases decided. Several people in Huntington said Mr. Daugherty routinely took cases that were assigned to other judges.

In written responses to questions for that article, Mr. Andrus said he was notified on four occasions that Mr. Daugherty had either taken cases assigned to other judges or taken unassigned cases. He issued a written directive April 29 saying the practice must end.

Several people, including former Huntington judge Dan Kemper, said Mr. Andrus and others failed to act earlier because Mr. Daugherty helped the office meet monthly goals.

In his written responses, Mr. Andrus said that "as a supervisor I don't ask judges why they decide cases the way they do." In Mr. Daugherty's case, he said, "I believe the numbers speak for themselves."

Many Social Security judges have said in interviews that they are under pressure to move cases along quickly to meet monthly targets ,and that little regard is given to the quality of their decisions. Social Security officials say they expect judges to act properly and protect the taxpayer money that funds the program.

A person answering the phone at Mr. Andrus's house Wednesday said the judge was out of town and not immediately available for comment. A Social Security Administration spokesman declined to comment.

The Social Security Administration's inspector general's office is investigating why Mr. Daugherty awarded benefits in such a high number of cases and whether there was any improper connection between him and local disability attorneys.

The situation in Huntington has triggered or expanded at least three congressional investigations.

There are close to 1,500 administrative law judges in the Social Security system who determine whether to award disability benefits for people who have been denied them at least twice before. The Social Security Disability Insurance program is one of the country's largest entitlement programs. It paid out $124 billion in benefits to 10.2 million people in 2010.

On June 3, Ms. Bice sent a memorandum to all the chief judges reminding them that a judge "may not unilaterally hear and/or decide cases that have already been assigned to another" judge.

Data show disability benefits can depend on judge

By Mike Chalmers, USA TODAY
Posted 7/1/2011 8:23:57 AM |
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The growing number of people seeking Social Security disability benefits are finding vast disparities in how their claims are decided.

The gap is most obvious among the Social Security Administration's 1,400 administrative law judges (ALJs), who hear appeals from people who believe their initial application was unfairly denied. Some judges approve most claims they hear, while others approve almost none, federal data show.

After years of releasing the data only by request, the agency now posts monthly updates of each judge's numbers on its website. Congress and the agency's inspector general have begun looking at the disparity. Yet both Social Security officials and advocates for the disabled say they are reluctant to interfere with the judges' independence.

"Congress has been pretty enthusiastic about the idea of ALJ

independence," said Social Security Commissioner Michael Astrue, adding that only "a handful" of judges have approval ratings above or below average.

"They can't tell an ALJ how to decide cases, but they can make sure they follow the agency's policies." said Ethel Zelenske, government affairs director for the National Organization of Social Security Claimants' Representatives.

The Social Security Administration reports about 8.4 million disabled workers nationwide get an average monthly benefit of $1,069. Another 8.1 million low-income disabled people with little work history get about $500 a month in Supplemental Security Income. More than 2.9 million people applied for disability-worker benefits in fiscal year 2010, up 38% over the past five years, agency figures show.

To cope with the increase, Social Security has added about 200 judges in the past five years and streamlined the process of reviewing claims. The average wait time for a decision has steadily dropped, from a peak of 532 days in August 2008 to 354 days last month, agency data show.

Kathleen Schuitemaker, 53, of Lincoln, Del., worked as a nurse until a 2003 car accident left her with severe back pain. Unable to work, she applied for disability and moved in with her elderly parents four years ago.

Judith Showalter, chief judge of the Social Security hearing office in Dover, Del., has twice denied Schuitemaker's case, the second time

coming after it was referred back to her by the agency's Appeals Council, which reviews decisions by administrative law judges. "How do you get it through this judge's head that it hurts to sit, stand or walk?" Schuitemaker said.

In fiscal years 2005 through 2010, Showalter denied 60% of the 2,739 cases she decided, federal data show. In the first eight months of this fiscal year, Showalter has denied 82% of her 297 claims, the nation's sixth-highest denial rate. The national average is 30%. None of the judges in this story responded to requests for comment. On the other side of the disparity is David Daugherty, a judge in the Huntington, W.Va., hearing office who has denied only 119 of the 8,381 claims, or just over 1% that he has decided since October 2004.

A story in *The Wall StreetJournal* in May drew attention to Daugherty's high approval rate and raised questions about him assigning himself cases involving a particular attorney. Social Security officials put Daugherty on indefinite leave, and the House Subcommittee on Social Security asked the agency's inspector general to investigate Daugherty's decisions, as well as the agency's oversight of judges.

Such extremes trouble Reps. Sam Johnson, R-Texas, and Xavier Becerra, D-Calif., who lead the subcommittee.
"They make everyone wonder what's going on, whether it's a wrongful denial or an improper approval of benefits," Becerra said. Johnson said he expects to hold hearings on the issue this summer. Claims that make it to an administrative law judge have already been

denied twice by a federally funded agency in each state called the Disability Determination Service (DDS). Denial rates vary there, too, but don't fully explain the disparity among judges.

For example, the hearing offices in Jericho, N.Y., and Queens, N.Y., both handle claims that have been denied by New York's DDS. Yet Jericho has the nation's second-lowest denial rate, 14%, while the office in Queens, N.Y., has the nation's fifth highest at 47%.

Among individual judges. Jericho's Ronald Waldman denied just 7% of his 981 cases in fiscal years 2008-10, while Queens' Hazel Strauss denied 73% of her 699 cases during the same period, data show. Strauss is one of five Queens judges targeted in a lawsuit by eight disabled people who say their claim denials reveal a pattern of bias among the judges.

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U.S. NEWS | JULY 11, 2011, 8:00 P.M. ET

High-Paying Disability Judges Cost Taxpayers $1 Billion a Year, Official Says

By DAMIAN PALETTA

WASHINGTON—Social Security Administration Commissioner Michael Astrue said judges in his agency who award disability benefits more than 85% of the time cost taxpayers roughly $1 billion a year.

Speaking at a House hearing into the role of judges in approving benefits, Mr. Astrue also said he had little power to address the problem because federal law prohibits him from interfering with judges' decisions.

The revelation came after the agency and its inspector general's office have launched multiple investigations into judges who award benefits in a high percentage of cases.

The probes were prompted by a May article in The Wall Street Journal about a judge in Huntington, W.Va., who awarded benefits in every case he saw in the first six months of fiscal 2011.

That judge—David B. Daugherty—was put on indefinite administrative leave after the article ran. He has said in a recent interview that he did nothing wrong. A criminal investigation into the situation in Huntington is ongoing.

On average, judges award benefits in roughly 60% of their decisions

At a congressional hearing Monday held jointly by subpanels in the House Judiciary and Ways and Means committees, Mr. Astrue said he has statistical evidence of a number of judges who pay or deny a disproportionate number of cases compared with their peers, but his "hands were essentially tied" by federal law.

There are roughly 1,500 administrative law judges in the Social Security Administration, and they hear appeals in disability cases that have been denied at least twice before.

The number of people receiving disability benefits has soared in recent years, with one of the two Social Security programs paying out $124 billion in benefits to 10.2 million people in 2010. Government estimates predict the Social Security Disability Insurance program will run out of money in 2018 if actions aren't taken to shore up its trust fund.

Judges say they are under enormous pressure to move cases to reduce a backlog, with the system now designed to make it easier for them to approve benefits rather than deny them because their approvals are rarely questioned, appealed, or scrutinized.

"I find it interesting that there is so much wringing of the hands about a judge who pays almost 100% of his cases, as if the agency didn't know about it, as if the agency wasn't complicit in it, as if the agency didn't

encourage it," said Marilyn Zahm, a Social Security judge in Buffalo who is an executive vice president of the judge's union, speaking in an interview after the hearing.

Mr. Astrue, a Republican, said the agency was also looking into judges who deny a disproportionate number of claims compared with their peers. He said judges who deny benefits in 80% or more of their cases end up saving taxpayers $200 million each year, though he wasn't suggesting this was a practice he condoned.

Republicans at the hearing criticized Mr. Astrue for not moving more quickly to address problems with the judges before they became public.

The situation in Huntington "starkly reveals how the near complete lack of accountability offers an abundance of chances for abuse," said Rep. Howard Coble (R., N.C.), who chairs the judiciary subcommittee overseeing courts. "Meanwhile, the claimants who suffer, not to mention the American taxpayer, get stuck with the bill."

Rep. Sam Johnson (R., Texas), who oversees a separate subcommittee overseeing Social Security, said lawmakers should consider new federal laws that prevent abuses in the disability programs from occurring.

But Rep. Hank Johnson (D., Ga.) said Republicans really wanted to dismantle the Social Security program and were using administrative law judges as a scapegoat.

"I fear that this hearing is really just a backdoor attempt to undermine Social Security by those opposed to having a social safety net," he said. "The ALJs are being used as whipping boys and girls," referring to the acronym for the administrative law judges.

The hearing included several tense exchanges between Mr. Astrue and lawmakers, with Democrats frustrated the agency hasn't done more to reduce a backlog of applicants and Republicans questioning abuse in the system.

Mr. Astrue, at one point, lashed out at lawmakers for threatening to cut his agency's funding, which he said will make it harder for judges to move more cases and erase a large backlog of pending cases.

"We're on the verge of getting there. And if we miss it, it's not because I have failed," Mr. Astrue said. "It's because Congress chose to fail, and it's up to all of you."

Write to Damian Paletta at damian.paletta@wsj.com

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Insolvency Looms as States Drain U.S. Disability Fund

CAGUAS, Puerto Rico—This mountainside town is home to a picturesque cathedral, a tobacco museum and a Wal-Mart Supercenter. Another defining feature: Caguas's 00725 zip code has more people who receive a disability check than any other in the U.S.

Puerto Rico has emerged in recent years as one of the easiest places in the U.S. to get payments from the Social Security Disability Insurance program, created during the Eisenhower administration to help people who can't work because of a health problem. In 2010, 63% of applicants there won approval, four percentage points higher than New Jersey and Wyoming, the most-generous U.S. states. In fact, nine of the top 10 U.S. zip codes for disabled workers receiving benefits can be found on Puerto Rico.

Disability Fund Recipients by State

See a map and detailed data.

State or area	Percent of applications that receive initial approval (FY 2010)
U.S.	N/A
Alabama	42.8%
Alaska	53.2%
Arizona	35.6%
Arkansas	42.9%
California	43.7%
[illegible]	[illegible]

- More photos and interactive graphics

The SSDI is set to soon become the first big federal benefit program to run out of cash—and one of the main reasons is U.S. states and territories have a large say in who qualifies for the federally funded program. Without changes, the Social Security retirement fund can survive intact through about 2040 and Medicare through 2029. The disability fund, however, will run dry in four to seven years without federal intervention, government auditors say.

In addition to the uneven selection process, SSDI has been pushed to the brink of insolvency by the sour economy. A huge wave of applicants joined the program over the past decade, boosting it from 6.6 million beneficiaries in 2000 to 10.2 million in 2010. New recipients have come from across the country, with an 85% increase in Texas over 10 years and a 69% increase in New Hampshire.

Over the years, Puerto Rico's dependence on SSDI has grown particularly stark, exacerbated by the closure of factories and U.S. military installations, an exodus of skilled workers and a number of corruption scandals.

Seated next to a wooden statue of an angel in his office, Pedro Torres-Morales, a doctor in the south Puerto Rican town of Maunabo, described the situation as "a political problem, an economic problem, a health problem, a social problem."

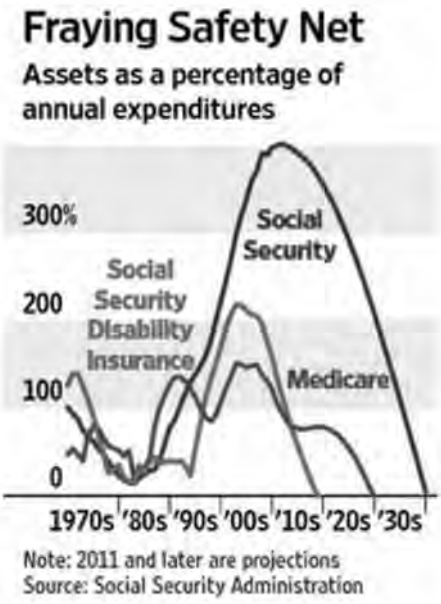
Journal Community

To others, it's mainly a matter of abuse. "The mentality is that it's 'big, rich Uncle Sam's money,'" said Ivan Gonzalez-Cancel, a prominent Democrat and cardiac surgeon in San Juan who is planning to run for governor in 2012 for the New Progressive Party. He said the system is rife with corruption, something local and federal officials deny.

Unlike Medicare or the Social Security retirement fund, which provide benefits mostly based on age, SSDI decisions are based in large part on medical opinions, which can vary from doctor to doctor, state to state.

Because someone else pays the bills, local officials have little incentive to keep the numbers low. The feds have tried to enforce consistency, but the process relies heavily on the judgment of doctors and administrative law judges who hear appeals.

Benefits can be modest: In 2009, they averaged $1,064 a month. But the program opens up access for recipients to other government programs, multiplying the ultimate cost to taxpayers.



Anyone who spends two years on SSDI qualifies for the Medicare health program, which usually is available only for those 65 years old and older. SSDI recipients tend to remain tethered to the program for years, and the government's lifetime financial commitment averages $300,000 per person, estimates David Autor, an SSDI expert who teaches at the Massachusetts Institute of Technology. "The system has profound problems," Mr. Autor said.

SSDI's financial woes pose a major test for the White House and Congress, which have been reluctant to tackle the budget-busting costs of entitlements.

Analysts who track the program say the only short-term way to save it without raising taxes would be to fold it into the fund that pays Social Security. That would likely force retirees to face benefit cuts two or three years sooner than they otherwise would have done, because SSDI costs would diminish retirement funds.

Supporters say SSDI serves a vital need for millions of people who have paid into the system, qualify for the benefits and depend on the income. Some contend its problems can be fixed by raising taxes or by diverting money from the Social Security fund for retirees.

"This is a program of crucial importance to every working American and his or her family," said Nancy Altman, co-director of Social Security Works, a group that fights cuts in Social Security benefits.

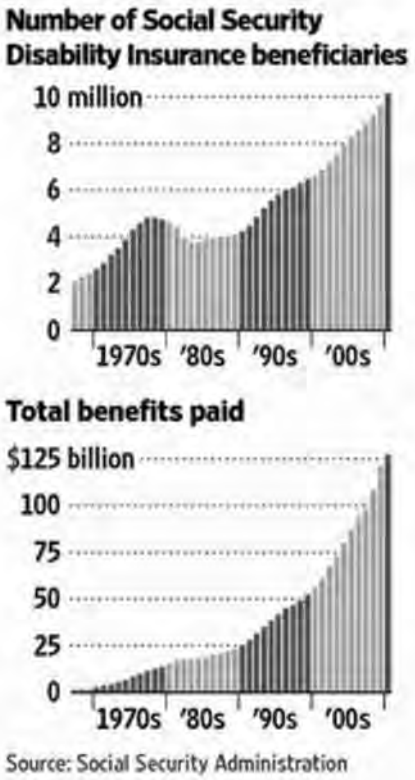
Critics have raised concerns about the solvency of the program, backed by a report last year from the nonpartisan Government Accountability Office alleging that the government was paying benefits to some people who didn't deserve them.

Millions of Americans fund the program through a portion of the Federal Insurance Contributions Act tax that's tied to their income.

The disability insurance trust fund was created in 1957 to provide a backstop to people who worked several years before suffering a debilitating illness or injury. Disability beneficiaries can now include those with cancer, chronic back pain, persistent anxiety and schizophrenia.

Applicants should no longer be able to work in a substantial, gainful way, and must provide medical records affirming the likelihood the applicant won't be able to work for at least another year, or that their health problems would eventually result in death.

The program has been a feature in agricultural, manufacturing and urban communities across the U.S., particularly where unemployment rates are high. As a percentage of total population, more SSDI money flows to West Virginia than anywhere else, according to government data. Experts attribute high concentrations there to unemployment and health problems related to manual labor.



Still, West Virginia has one of the highest rejection rates of applicants anywhere in the country, with just 36.7% of applicants making it into the programs on their initial applications last year, compared to a national average of 46.9%.

In 2005, SSDI began spending more money than it brought in through tax receipts. In 2010, the number of beneficiaries grew by 489,488, the largest one-year increase ever. It is projected to spend $153 billion on benefits and other costs in 2015, $22 billion more than it brings in through tax revenue and other income. Its surplus funds built up over the years are expected to be extinguished in four to seven years.

Puerto Rico has long had an outsize reliance on disability benefits. The island has had a double-digit jobless rate for most of the past 30 years, settling at 15.7% at the end of December. Doctors here say as people find it harder to get a job, they apply for disability benefits.

Even though Puerto Rico's population fell in the past 10 years, from 3.8 million people in 2000 to roughly 3.7 million today, the number of people on SSDI rose 25% from 2000 through 2009 to 188,298. The Social Security Administration sent roughly $163 million a month in SSDI benefits to Puerto Rico in 2009, the last available full-year data, accounting for 2% of the program's total spending.

In 2006, just 36% of applicants in Puerto Rico were approved for benefits. By 2010, the rate had rocketed. In December, 69% of applicants were approved, the highest one-month approval rate by any state or U.S. territory since 2002.

On a recent weekday, 20 people waited for their names to be called inside the Social Security Administration's third-floor office in Caguas under framed portraits of President Barack Obama, Vice President Joseph Biden and SSA Commissioner Michael Astrue.

The pale-blue room looked like any other government office, with 22 customer-service windows and a white SSA seal on the glass door.

Twenty-seven miles away is the zip code with the second-most SSDI beneficiaries— 00767—home to the coastal town of Yahucoa and its 22% unemployment rate. At the end of 2009, 3,385 people, about 15% of its residents, received SSDI benefits.

Lissette Franceschi, from Peñuelas, Puerto Rico, lost her job as a hospital nurse during a round of layoffs in 2008. The 54-year-old fell into a depression that she said required psychiatric help. "I had panic attacks, I couldn't go out alone, I couldn't drive," she said. "There was no way I could work."

Seven months after her layoff, in late 2008, she applied for SSDI and was denied for "insufficient information." Later, a bone scan detected she had an incipient form of arthritis, and she applied again in early 2009. In November 2010, she told her story to a judge, detailing her layoff, the depression and her arthritis. She was granted $1,084 a month in benefits, retroactive to when she filed in early 2009.

Marcos Rodriguez-Ema, chief of staff to Puerto Rico Gov. Luis Fortuno, said he couldn't explain why the island's approval rate has spiked. He speculated more people were pursuing cases because it was harder to find jobs and decent health care. He said it wasn't the result of any change in policy on the island.

Beatrice Disman is in charge of the Social Security Administration's New York region, which oversees operations in Puerto Rico. She said the island has to follow national regulations. "They are not free to do things on their own," she said. "How you make a disability decision is the same in Puerto Rico as is it in New York, and they must follow the same rules."

She said a routine external review found that cases in Puerto Rico were decided accurately 99% of the time in 2010. One reason the approval rate has increased is that the government has hired more people in recent years to process applications for benefits, which has expedited the process, Ms. Disman said.

Government officials say there are a number of checks in place to prevent inconsistencies, including backup screenings conducted remotely, meant to stop people from obtaining benefits who don't meet federal standards.

Doctors, lawyers, and others say standards are left to the interpretation of the many officials involved in the process, which makes it easier for people to get into the system. The $1,000-a-month SSDI check can pay almost as much as a low-wage job in Puerto Rico, and it comes with access to health care.

Administrative law judges in Puerto Rico, who make decisions in cases that are initially rejected or need further review, approved full or partial benefits in 80% of the cases they reviewed in fiscal 2010, according to data reviewed by The Wall Street Journal. One judge in San Juan, Manuel del Valle, approved 98% of the cases brought to him during that span, according to data reviewed by The Wall Street Journal. Mr. del Valle, through a Social Security spokesperson, declined to comment.

Doctors in the area say applicants are still pouring into the system. Several said the SSDI program has become so large, and in some cases so dependent on medical opinions, that patients have worked out which

doctors and government officials are less stringent, a phenomenon that lawyers in the U.S. said is also occurring in different parts of the country. They say this explains the high concentrations of beneficiaries in certain areas.

"I tell my secretary that I won't see someone in my office just to fill out forms for the Social Security Administration," said Carlos G. Diaz Silva, a doctor from the southern town of Ponce, who until recently headed the Puerto Rico chapter of the American Psychiatric Association. "It makes me very uncomfortable because there's already an economic consideration."

—Keith Johnson contributed to this article.

Mr. JOHNSON OF TEXAS. So why do these judges get away with this? Under the law ALJs have judicial independence, which seems to mean they operate with little or no accountability. Simply put, the agency can't question their decisions even if they grant approval in most of their cases or deny most of them.

ALJs who produce extraordinary numbers of decisions or who do very little are hard to hold accountable. Their collective bargaining agreement affords ALJs additional layers of protection and the ALJ union has fought long and hard to keep those protections in place. While the laws that protect ALJs give the agencies the ability to pursue the most egregious cases, it is a costly and time consuming project.

No one should have to wait months or even years longer than their hearing decision because of the office or the ALJ the appeal is assigned to, nor should the taxpayer have to foot the bill. That is plain wrong. Those who aren't performing up to expectations must be held accountable.

Social Security must work fairly for all Americans and protect our hard earned taxpayer dollars, and we need to find out what is going on in this program and fix it. And if current law allows this to happen we need to change the law. Preserving the public trust demands no less.

Mr. COBLE. I thank the gentleman. I see the Chairman of the full Committee is here, Mr. Smith, and then I will recognize Mr. Becerra and Mr. Johnson in that order. Mr. Smith, you are recognized for 5 minutes.

Mr. SMITH OF TEXAS. Thank you, Mr. Chairman. The first thing to say is that this is the first joint hearing that the Judiciary Committee has held with any other Committee this year, and it is well worth our doing so.

Today Social Security is stretched to it the limit. There is no margin of error for waste, fraud or abuse in our Social Security system, but administrative law judges who work at the Social Security Administration apparently have little accountability for their performance.

Last May the Wall Street Journal reported on an administrative law judge in West Virginia who awarded Federal disability benefits in every single case, 729 all together, that came before him in the first half of fiscal year 2011. This judge is now on indefinite administrative leave but still draws his full salary while not doing any work for the American taxpayer. This case raises serious questions about how ALJs are held accountable for their performance.

Why did we need to wait for the Wall Street Journal to expose this case? Were there no red flags along the way? How can we be sure that this is an isolated case and not a symptom of a systemic problem for the entire Federal ALJ corps, 85 percent of whom work for the Social Security Administration?

In his written testimony Commissioner Astrue describes another ALJ who also was working full-time for the Department of Defense. Commissioner Astrue alludes to yet another ALJ who was arrested for domestic violence. Meanwhile, SSA continues to struggle to gain control of its backlog. More than 746,000 cases currently are pending. Last month it was reported the number of pending cases increased by another 5 percent in just 1 month.

I hope that today we can have a frank discussion about whether more money is the only answer or if other reforms would solve the problem more efficiently. Commissioner Astrue insists that most ALJs are dedicated and conscientious public servants, but he acknowledges that there are a certain number who under perform, approve or deny a suspiciously high number of cases or otherwise misbehave in office.

Perhaps the Office of Personnel Management can shed some light on this issue. As Deputy Director Griffin explains in her testimony, the OPM accepts applications, administers the ALJ exam, and maintains the register from which agencies hire their ALJs. But according to Social Security Commissioner Astrue, more than one-fourth of administrative law judges assigned to the Social Security Administration do not meet even their minimum annual benchmark of deciding 500 cases. This may be progress from the abysmal levels recorded in 2007 when far fewer administrative law judges met their benchmarks and claimants sometimes had to wait 46 months, almost 4 years, for their claims to be decided, but the Social Security Administration has still not made enough progress. Last year a claimant still had to wait 27 months, well over 2 years.

To clear the remaining backlog in cases, Commissioner Astrue states that he needs increased funding to hire more administrative law judges. Ms. Griffin states, "It is the responsibility of the agencies to hire ALJs," but agencies can only hire administrative law judges from OPM's register. It is incumbent upon OPM to properly screen applicants and maintain the administrative law judge register.

Commissioner Astrue's agency will pay OPM $2.7 million this year for personnel services related to administrative law judges. The American taxpayer has the right to know whether the Social Security Administration is getting its money's worth from OPM.

Any human system is only as good as the people running it. If the wrong people become administrative law judges, then we shouldn't be surprised when the system fails.

I want to thank Congressman Johnson, my Texas colleague and Chairman of the Social Security Subcommittee, for his efforts on this important issue. And believe me, he has been talking to me about this issue for months, if not years. And I also want to thank the Chairman of this Committee, Mr. Coble, for trying to address this issue in today's hearing, and I yield back.

Mr. COBLE. I thank the gentleman. The Chair now recognizes the distinguished from California, Mr. Xavier Becerra, who, Sam, I told you that I was pretty sure you used to be an alumnus of the Judiciary Committee. Good to have you back with us, Xavier. You are recognized for 5 minutes.

Mr. BECERRA. Mr. Chairman, it was always a pleasure to be in this room, and I am pleased we are doing this hearing. So to you, and to Chairman Johnson, the Chairman of my Subcommittee on Social Security, I say thank you to the two of you for this hearing. I am pleased to join my colleague, the ranking Democrat on the Committee on the Judiciary side, Mr. Johnson, as well.

Mr. Chairman, Social Security disability benefits are an earned benefit that is a vital source of income for severely disabled workers in this country. Only workers who pay into Social Security are

eligible to receive these disability benefits. These benefits are modest, less than $13,000 a year for the average beneficiary. For more than 4 of the 10 disabled workers who are getting the benefits, those benefits provide almost their entire income. Three-quarters of disabled workers live in families with total family income of less than $15,000. That is a statistic that is a little dated from 2001 but one of the best measures that we have, and some 20 percent of those individuals are living below the poverty level.

Although it often takes the Social Security Administration longer than is reasonable to make a decision, our Social Security Disability Program generally ensures that disabled workers get the benefits they have earned and that those who do not qualify are denied the benefits. Social Security has extremely strict eligibility rules.

Last year SSA made decisions on approximately 3 million initial applications for disability benefits and reviewed 1.4 million appeals of denied claims, including 620,000 determinations by SSA's independent ALJs, the administrative law judges. About 35 percent of applicants were awarded benefits based on their initial application. Of those who are denied, historically about half accept the decision and do not file an appeal and it ends there. Sixty-one percent of those who do appeal were able to present evidence proving that they were entitled to benefits.

Without Social Security's independent appeals process, those individuals and their families would have been denied benefits that they had earned through their work. The remaining 39 percent were not awarded benefits. Of the people who apply for disability benefits each year, therefore, about half eventually are awarded benefits. Only about half of those who claim benefits get them.

As the backlog of disabled workers waiting for appeals hearing shows, budget cuts for SSA have consequences. The latest round of Republican budget cuts will have consequences, too. One particular problem area in the Social Security Disability Program has been the long delays claimants experience while waiting to hear if they will receive disability benefits, particularly for those who appeal.

SSA has been able to use the resources our Committee and on the Ways and Means side worked on a bipartisan basis to provide, starting in 2008, to significantly reduce waiting times for disability appeals. Waiting times have dropped from a high of 535 days delay in 2008 to an average of 354 days in May 2011. Instead of helping SSA continue reducing waiting times, my colleagues on the Republican side this year chose to cut SSA's operating budget by $1 billion below what the agency needed to keep up with incoming claims and continuous efforts to reduce wait time. I am increasingly worried that these cuts will undo the hard won progress and worsen the hardship and suffering of very ill and disabled people.

As this chart will show, already the Social Security Administration has had to abandon its plan to open eight new hearing offices this year, offices that could process thousands of appeals to ensure that deserving applicants are paid the benefits they are due. SSA is also losing personnel who help process and approve claims because those budget cuts mean SSA can't replace workers who retire or otherwise leave.

We should be very cautious about making changes that might deny claimants due process, especially since we have mechanisms in place that can address those ALJs who are found not to be complying with SSA's rules and regulations. SSA today has the authority to remove an ALJ who is not complying with the rules and regulations. Commissioner Astrue has increased SSA's use of the Merit System Protection Board to remove judges that flagrantly violate the rules, as is appropriate, and we applaud you for that, Mr. Commissioner.

Last month Chairman Johnson and I wrote to the Social Security Inspector General asking him to review SSA's management and oversight of ALJs, with a particular focus on judges whose productivity or decision making appears to differ greatly from their peers. Rather than rushing to judgment based on news reports, we should wait for the results of that review.

We also asked the Inspector General to evaluate whether SSA is effectively using management controls to ensure that ALJs follow agency policies as they are required to do. I know we are all looking forward to receiving those recommendations on how we can remove the anomalies in an otherwise fundamentally effective Social Security Disability system.

Mr. Chairman, I look forward to the testimony of the witnesses, and I yield back the balance of my time.

Mr. COBLE. I thank the gentleman. The Ranking Member for our Subcommittee is not here, but Mr. Johnson, the distinguished gentleman from Georgia, will fill in for Mr. Cohen. You are recognized for 5 minutes.

Mr. JOHNSON OF GEORGIA. Thank you, Mr. Chairman. Social Security is the bedrock of the social safety net that Americans have been committed to providing for one another since the New Deal. That commitment reflects the kind of people we are and our longstanding and fundamental values that, alongside our commitment to individualism and self-reliance, is our belief that we are our brothers and sisters' keepers.

The guarantees of social insurance unfortunately have come under attack, severe attack over the last 30 years by those who believe that all the risks in life should be borne by ordinary people and that government has no obligation to mitigate those risks, even to a minimal extent. Such a Darwinian view is easy to hold when one has the wealth and resources to mitigate one's own life risks. Most people, however, are not lucky enough to have such resources. Most people will need what we have prepared for them, which is Social Security and other social insurance programs.

While the focus of today's hearing is on the role of administrative law judges, or ALJs, at the Social Security Administration, I feel that this hearing is really just a back door attempt to undermine Social Security by those opposed to having a social safety net. The ALJs are being used as whipping boys and girls.

We should see this hearing in light of the majority's broader antisocial safety net agenda, especially as illustrated by Representative Paul Ryan's budget that eliminates Medicare and by the majority's repeated attempt to push for cuts to social insurance programs during the debt ceiling negotiations.

What these opponents of the social safety net may not accomplish outright, they seek to do on a piecemeal basis, in this case by pushing to undermine the independence of ALJs from the political pressure to deny benefits, including those to deserving claimants.

ALJs decide the appeals from denials of Social Security disability benefits. As such, they are bulwarks against politically motivated, mistaken or otherwise unjustified denials of disability benefits by the SSA. To ensure that claimants who appeal a denial of disability benefits are given due process, ALJs are insulated from potential political pressure to deny benefits. This insulation comes in the form of certain salary and tenure protections that are not afforded to other employees of SSA.

It is for this reason that any attempt to undermine the independence of security ALJs, including proposals to replace them with less independent hearing examiners, should be met with strong skepticism. In addition to the measures designed to ensure their decisional independence, ALJs are distinguished from other SSA employees in other ways that ensure the quality and fairness of their decisions.

For instance, ALJs must be licensed lawyers, have a minimum of 7 years of administrative law or trial experience before local, State or Federal administrative agencies, courts or other adjudicative bodies. These professional qualifications, these requirements further help ensure that decisions concerning disability benefits are approached with analytical rigor and legal sufficiency and are not based on politics or ideology.

I also find it telling that the majority is training its guns on Social Security Administration ALJs at the very moment that it is also seeking to undermine health and safety regulations. Lax regulation of workplace, environmental, food and drug, and financial safety and security potentially give rise to greater numbers of Social Security disability claims. If the majority has its way, people will be less protected from harm in the first instance because of a lack of adequate regulation, and they will be less protected should harm befall them because there will be a weakened safety net to catch them if they fall.

The majority's message to the American people is you are on your own if you get injured at work, get sick because of contaminated food, or lose your job because of reckless corporate behavior.

Finally, I am deeply concerned that the minority was not given an opportunity to invite a witness. At a minimum, a representative of the Social Security ALJs should have been invited in order for Members of our respective Committees to have a more complete picture on the issues before us. The majority has been a little too cute with its claim that the witnesses represent the Administration.

With all due respect, the reality is that Social Security Commissioner Michael Astrue is a George W. Bush appointee serving out a fixed 6-year term. His views reflect the political agenda of the Republican party and others who are hostile toward the idea of a social safety net.

Everyone observing this hearing should bear those facts in mind. The backlog in disability benefits determinations is troubling. This

backlog, however, may stem more from a lack of adequate resources than from delinquent ALJs. When Congress has given SSA more resources, the backlog has been reduced. I fear that in the current political atmosphere that fetishes budget cuts, above all else cuts in resources to Social Security Administration, will result once again in an increased backlog of cases.

Ultimately no one wants bad ALJs who do not do their jobs. SSA, however, already has tools at its disposal to take adverse employment actions against ALJs for cause, and I wonder just how many times that has been done.

I view the thrust of today's hearing with great concern for the reasons I have outlined, and so should you.

I yield back.

Mr. COBLE. All other Members may submit opening statements for the record. Mr. Johnson, I am told that the Democrats were asked to invite a witness but that was declined. Much of what you say I don't embrace, but you and I can talk about that another day.

The best laid plans of mice and men oftentimes go awry. Today is no exception. I did not know I was scheduled to Chair this hearing until Friday afternoon. That was my fault, no one else to blame. But Mr. Smith has given me an excused absence when I have to abruptly depart subsequently, and I thank the distinguished gentleman from South Carolina, Mr. Gowdy, for agreeing to assume the gavel when that time comes.

We are pleased to have two outstanding witnesses before us today. Michael Astrue is Commissioner of Social Security and has had a distinguished career in both public and private sectors. He is an honors graduate of Yale University and the Harvard School of Law. After law school he clerked for Judge Walter Skinner of the U.S. District Court in Massachusetts. Mr. Astrue has a lengthy career in public service, serving as Acting Deputy Assistant Secretary for Human Services Legislation at the U.S. Department of Health and Human Services, Counselor to the Commissioner of Social Security, Associate Counsel to Presidents Reagan and George H.W. Bush, and General Counsel of the U.S. Department of Health and Human Services. We welcome Mr. Astrue and look forward to his insights.

Ms. Christine Griffin is Deputy Director of the U.S. Office of Personnel Management where she manages the Federal Government's 1.59 million employees. Prior to OPM, Ms. Griffin was a Commissioner of the U.S. Equal Opportunity Commission and has worked in labor and employment law positions in both public and private sectors. Ms. Griffin earlier served as the attorney adviser to the former Vice Chair of the EEOC. Ms. Griffin earned her undergraduate degree from the Massachusetts Maritime Academy and her law degree from the Boston College School of Law. Ms. Griffin is also a veteran of United States Army. We appreciate her willingness to share her expertise with the Subcommittee today.

Commissioner, we will start with you. And if you witnesses could confine your statements to as near 5 minutes as possible, there will be a green light that assures you the ice on which you are standing is thick. The light then turns to amber and then the ice becomes less thick. If you could wrap up when the red light appears, we would appreciate that. Good to have you both with us.

Commissioner, you may proceed.

TESTIMONY OF MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY, SOCIAL SECURITY ADMINISTRATION

Mr. ASTRUE. Thank you, Chairman Smith, Chairman Johnson, Chairman Coble, Ranking Member Becerra, and Members of the Subcommittees. Thank you for this opportunity to discuss what the Supreme Court has called probably the largest adjudicative agency in the Western world.

This year about 1,400 administrative law judges will decide about 832,000 disability appeals. When I first testified before the Social Security Subcommittee on my second day as Commissioner, our backlog situation was bleak. Backlogs had risen steadily throughout the decade, and the reform initiative that 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 hearing operations nearly 10,000 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 and almost 1.5 million more applications for benefits caused by the economic downturn.

Hundreds of small but important initiatives, including management information systems, uniform business processes, smarter use of support staff, better training, better allocation of resources, and decisional templates have steadily brought us near our original goal of an average of 270 days to decide a case.

An essential element of our progress has been improved judicial productivity. Since 2007, when Chief Judge Cristaudo issued his influential memo establishing 500 to 700 decisions per year as our expectation for each judge, our judges have improved from 2.19 decisions per day in fiscal year 2007 to 2.43 decisions per day so far this fiscal year. In fiscal year 2007, 46 percent of our judges met this expectation. In fiscal year 2010, 74 percent met it, and we expect to do slightly better this year.

Let me echo Mr. Coble and emphasize that most of our ALJs responsibly handle their cases. However, recent Wall Street Journal articles by Damien Paletta have provoked constructive debate about an issue I have raised several times before Congress—the small number of judges who do not properly apply the statute.

It is critical that all Members of Congress understand what our Subcommittee understands. We have not taken action against judges based strictly on allowance or denial rates because Congress has put great weight on an ALJ's qualified decisional independence.

The Administration is open to exploring options for addressing these situations in consultation with ALJs, other Federal agencies, and other stakeholders. Areas to explore could include examining statistical evidence showing very significant variations 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.

We are doing what we can under the current law. 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 decide neither too few nor too many cases. By management instruction, we are limiting assignment of new cases to no more than 1,200 annually.

On my watch we have raised the standards for judicial selections. Four years ago, we had an OPM list of judicial candidates that was 10 years old, and nobody was doing background checks on candidates. The 685 judges we have hired since 2007 using a more rigorous internal hiring approach have been productive and respectful of the statute. We have not had a single case of serious misconduct 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.

Our efforts continue. I understand that later this month, we expect to file a termination action with the Merit Systems Protection Board based on the poor performance of an ALJ who is deciding very few cases.

I know that you understand that I cannot comment on pending investigations and personnel actions, but I am happy to answer any other questions that you may have.Thank you very much.

[The prepared statement of Mr. Astrue follows:]

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.

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[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.

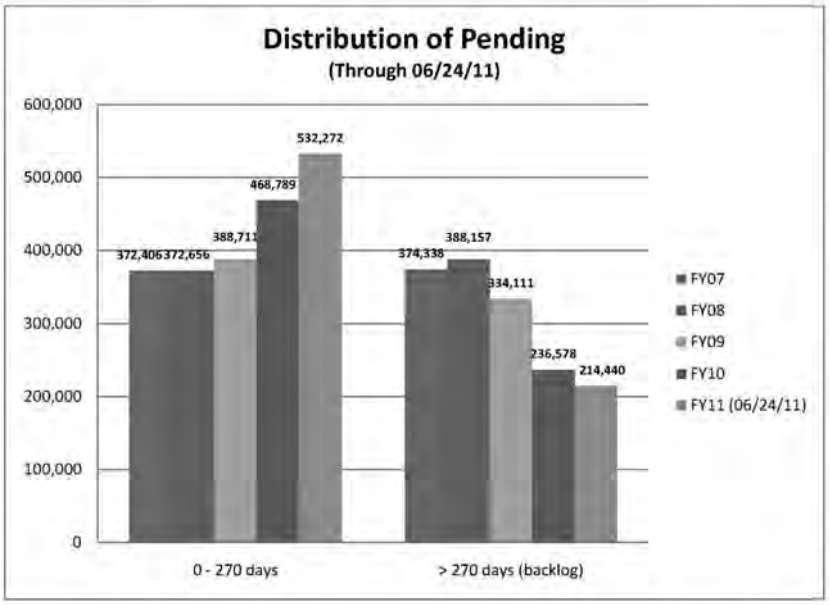
Thankfully, sound planning and our employees' hard work have prevented this scenario from unfolding. Despite the increase in hearing requests, we have steadily improved service by deciding more cases and deciding them consistently.

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 dispositions[5]. 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 courts[7] and the Department of Justice's Office of Legal Counsel[8] 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]

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[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

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[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 on 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.

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Mr. COBLE. Thank you, Commissioner. You beat the red light. Kudos to you for that.

Ms. Griffin, good to have you with us. You may proceed.

TESTIMONY OF CHRISTINE GRIFFIN, DEPUTY DIRECTOR, U.S. OFFICE OF PERSONNEL MANAGEMENT

Ms. GRIFFIN. Thank you. Chairman Johnson, Chairman Coble, Ranking Member Becerra, Mr. Johnson, and Members of the Committee. I am pleased to have the opportunity to appear before you this afternoon to discuss OPM's role in the hiring process used for the administrative law judges.

The administrative law judge function was created by the Administrative Procedure Act of 1946 to ensure fairness in administrative proceedings before Federal Government agencies. The Federal Government employs administrative law judges, called ALJs, at a number of agencies across the Federal Government.

As of December 2010 there were 1,704 ALJs assigned to Federal agencies across the Federal Government. According to statistics compiled by OPM, the Social Security Administration employs 85 percent of all the ALJs.

Consistent with the Administrative Procedure Act (APA) and Civil Service law, OPM is responsible for establishing ALJ qualifications, establishing classification standards for determining ALJ pay, developing and administering the ALJ examination, and maintaining a listing of qualified ALJ candidates for ALJ employment by Federal agencies. OPM also approves noncompetitive personnel actions affecting current ALJs, such as promotions.

By law OPM cannot delegate the ALJ examination to any other agency. The qualification standards developed by OPM prescribes minimum requirements for ALJ positions. In order to be considered, an applicant must meet both the licensure and experience requirements and place among the more highly qualified applicants at the conclusion the first segment of the examination.

Applicants who are among the more highly qualified group must then complete additional components of OPM's ALJ competitive examination. The current qualification requirements, which were updated in 2007, are defined in the qualification standard for administrative law judge positions.

Periodically open periods for the ALJ examinations are posted by a job opportunity announcement on OPM's Web site. The examination has been administered three times since 2007. The last general administration of the ALJ examination occurred in 2009 to 2010. Further, OPM continues to periodically administer the examination to 10 point preference eligible veterans upon request.

It is the responsibility of the agencies to ultimately hire the ALJs. Agencies must make selections from the certificates that are consistent with the applicable merit principles and veteran's preference rules regarding the order of selection. However, it is OPM's responsibility to ensure that the ALJ register maintains a sufficient number of qualified ALJ applicants that meet the projected hiring needs of agencies, including giving agencies an adequate number of choices for each position to be filled.

Once an ALJ is appointed by an agency, the ALJ receives a career appointment and is not subject to a probationary period. The hiring agency is further prohibited by statute and regulation from rating the job performance of the ALJ, including from awarding the ALJ monetary awards, honorary awards, or any other kind of incentive. The restrictions on agency performance ratings are in

place in order to ensure that the ALJs are not influenced by an agency when performing their judicial functions.

Nonetheless, ALJs not unaccountable to their agency. Misconduct by an ALJ is subject to sanction. And an agency may take actions against an ALJ for good cause as established and determined by the Merit System Protection Board.

Members of the Subcommittee, thank you for having me here today to explain the role of OPM in the selection of ALJs, and I will be happy to address any questions you may have.

[The prepared statement of Ms. Griffin follows:]

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

STATEMENT OF
THE HONORABLE
CHRISTINE M. GRIFFIN
DEPUTY DIRECTOR
U.S. OFFICE OF PERSONNEL MANAGEMENT

before the

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

on

'THE ROLE OF SOCIAL SECURITY ADMINISTRATIVE LAW JUDGES'

July 11, 2011

Chairman Johnson, Chairman Coble, Ranking Member Becerra, Ranking Member Cohen and members of the Subcommittees:

I am pleased to have the opportunity to appear before you this afternoon to discuss the role of the Office of Personnel Management (OPM) with respect to the hiring process used for Administrative Law Judges (ALJs), including qualification standards and administration of the examination.

The Role of ALJs

The Administrative Law Judge (ALJ) function was created by the Administrative Procedure Act (APA) in 1946 to ensure fairness in administrative proceedings before Federal Government agencies. ALJs have two primary duties which include 1) presiding over agency hearings, taking evidence, and acting as a fact finder in proceedings and 2) acting as a decisionmaker by making an initial determination about the resolution of a dispute. The Federal Government employs ALJs in a number of agencies throughout the United States.

Cases may involve Federal laws and regulations in areas such as antitrust, banking, communications, energy, environmental protection, health and safety, housing, international trade, labor management relations, securities and commodities markets, social security disability and other benefits claims, and transportation. As of December 2010, there are 1,704 ALJs

Statement of the Honorable Christine Griffin
Deputy Director
U.S. Office of Personnel Management

July 11, 2011
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assigned to Federal agencies across the Federal government. According to statistics compiled by OPM and maintained in the Central Personnel Data File, the Social Security Administration employs 85% of all ALJs.

The Role of OPM in the Hiring Process

Consistent with the Administrative Procedure Act and Civil Service law, OPM is responsible for the following: establishing ALJ qualifications and classification standards for determining ALJs' pay according to their duties; developing and administering the ALJ examination; and maintaining a listing, referred to as the "ALJ register," of qualified candidates for ALJ employment by Federal agencies. OPM also is responsible for approving non-competitive personnel actions affecting incumbent ALJs, such as promotions, transfers, reassignments, reinstatements, and interagency details. By law, OPM cannot delegate the ALJ examination to any other agency.

The qualification standard developed by OPM prescribes minimum requirements for ALJ positions. In order to be considered, an applicant must meet both the licensure and experience requirements and place among the more highly qualified applicants at the conclusion of the first segment of the examination. Applicants who are among the more highly qualified group must then complete additional components of the OPM ALJ competitive examination in order to complete the rating and ranking process. The current qualification requirements, which were updated in 2007, are defined in the *Qualification Standard for Administrative Law Judge Positions*. This includes the requirement that applicants must be licensed and authorized to practice law under the laws of a State, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the United States Constitution throughout the selection process, including any period on the standing register of eligibles. Applicants must also have a full seven years of experience as a licensed attorney preparing for, participating in, and/or reviewing formal hearings or trials involving litigation and/or administrative law at the Federal, State or local level. Qualifying litigation experience involves cases in which a complaint was filed with a court, or a charging document (e.g., indictment or information) was issued by a court, a grand jury, or appropriate military authority and qualifying administrative law experience involves cases in which a formal procedure was initiated by a governmental administrative body.

Candidates must also undertake the OPM administrative law judge competitive examination to be considered for an ALJ position. Periodically, open periods for the ALJ examinations are posted by a job opportunity announcement on OPM's website at: www.USAJOBS.gov. In early 2007 OPM issued new ALJ regulations and opened a newly developed ALJ examination. The examination has been administered three times since 2007. The last general administration (consisting of the testing of all applicants, scoring, and the adjudication of appeals) of the ALJ examination occurred in 2009-2010. OPM continues to periodically administer the examination to 10 point preference eligible applicants, upon request, as required by applicable law.

Statement of the Honorable Christine Griffin
Deputy Director
U.S. Office of Personnel Management

July 11, 2011

The purpose of the examination is to evaluate the degree to which a candidate possesses the competencies determined to be necessary to performing the work of an ALJ. The examination is professionally developed by psychologists. The ALJ examination developed and in use since 2007 includes an accomplishment record, a written demonstration, and a structured interview. OPM conducts occupational analyses to ensure the continuing validity of the examination and to keep current with the state of the art in testing methodology.

As noted earlier, ALJ candidates are placed on the ALJ register after completing a multi-part examination developed and administered by OPM. OPM is responsible for maintaining the ALJ register, the list of individuals who are eligible, who successfully completed the ALJ assessment. When an agency seeks to hire entry-level ALJs, it submits a request to OPM with the number of positions to be filled and the locations. OPM uses the ALJ register to create a Certificate of Eligibles, which lists names of eligible candidates, in descending numerical score order (including any applicable veterans' preference points) and based on the geographical preferences of eligibles.

It is the responsibility of the agencies to hire ALJs. That is, to make selections from the certificate (including whether to make any selections), consistent with the applicable merit principles and veteran preference rules regarding the order of selection. It is OPM's responsibility to ensure that the ALJ register maintains a sufficient number of qualified ALJ eligibles to meet the projected hiring needs of agencies, including enabling agencies to have an adequate number of choices for each position to be filled.

Once an ALJ is appointed by an agency, the ALJ receives a "career appointment," and is not subject to a probationary period. The hiring agency is further prohibited by statute and regulation from rating the job performance of the ALJ and from awarding the ALJ monetary awards, honorary awards, or any other kind of incentive. The restrictions on agency performance ratings are in place in order to ensure that the ALJ can be free of agency interference with the ALJ's judicial functions. Nonetheless, ALJs are not unaccountable to the agency. Misconduct by an ALJ is subject to sanction. An agency may remove, suspend, reduce in level, reduce in pay, or furlough for 30 days or less an administrative law judge for good cause established and determined by the Merit Systems Protection Board on the record and after opportunity for a hearing before the Board.

Conclusion

Members of the Subcommittee, thank you for having me here today to explain the role of OPM in the selection of ALJs. I would be happy to address any questions you may have.

Mr. COBLE. You even beat the amber light.

Ms. GRIFFIN. I was going fast.

Mr. COBLE. I appreciate that. Ladies and gentlemen, we try to comply with the 5-minute rule against ourselves as well, so if could you keep your questions tersely.

Commissioner, it gets one's attention when an ALJ is granting on the one hand or denying on the other hand a disproportionate number of claims in his or her cases. How do you track this, A? And B, what do you with the data?

Mr. ASTRUE. Mr. Chairman, we have better tracking than we had before because we use more precise management data than we did in the past. We use this primarily for training initially and then for counseling if the training does not work. Our hands are substantially tied in terms of using a lot of that data for discipline by a 1998 regulation that in my understanding, was done in large part at the insistance of the Congress at the time. So I can't use statistical deviation very easily as a basis for removal or even to look more closely at a judge. So we use that data now the best way we can, which is for training and then for counseling. And I think it has been somewhat effective.

Mr. COBLE. I thank you for that.

Since 85 percent of the ALJs in the Federal Government are employed by SSA, would it be helpful to you in your opinion, sir, if OPM created a separate exam and ALJ register for SSA? You can weigh in on this, too, Ms. Griffin.

Mr. ASTRUE. I don't think a separate exam is necessary. I do think that there needs to be better consultation between OPM and SSA than in the past. It is better under Director Berry, but at the staff level when you try to engage, typically we hear, well, there is litigation risk, and we are not allowed to discuss those things. And it is frustrating historically to have 85 percent of the administrative law judges and essentially no input into how they are rated and selected.

Mr. COBLE. Ms. Griffin, you want to be heard on that?

Ms. GRIFFIN. I would just say, too, I don't think it is necessary to have a separate exam. I think what we are looking for is a register of really good people that can be used across a variety of Federal agencies. And as the Administrative Procedure Act stated and was passed, it was to support the fact that we could have independent decision makers at the agencies so that we were being fair. So I agree that I don't think it is necessary.

And I do know that Director Berry and Commissioner Astrue have had several talks since Director Berry has been there. And he is committed, as I am, to continuing discussions. We do every time the exam is open and we go through the process of trying to evaluate and get really better at job analysis of ALJs so that we are making sure the exam reflects what is needed. We have consulted with the Commissioner and other people at Social Security and will continue to do so.

Mr. COBLE. Thank you.

Ms. GRIFFIN. We are in the process of doing that again right now.

Mr. COBLE. I thank you for that.

Ms. Griffin, let me ask you this. When an ALJ is placed on administrative leave, why would it not be fair for him or her not to

be paid during this time but rather to receive backpay, including interest, maybe even attorney's fees if he or she prevails before the MSPB?

Ms. GRIFFIN. I actually don't—I don't know the answer to that question. It was interesting to note that the ALJ in question you referred to is being paid while on administrative leave. I don't know exactly why that is and what rule governs that, but I would be happy to find out.

Mr. COBLE. You all think about that and get back to us.

[The information referred to follows:]

Follow-up information as requested above:

Adverse actions involving ALJs are undertaken by the employing agency, not OPM. OPM observes that the notion of "administrative leave," as it is commonly understood, is an excused absence with pay. See, e.g., 5 C.F.R. § 930.211(b)(4). If the Congressman is referencing the notion of a suspension, as that term is generally used in chapter 75, see 5 U.S.C. §§ 7501(2) (" 'suspension' means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay"); 7511(a)(2) ('suspension' has the same meaning as set forth in section 7501(2) of this title) (emphasis supplied), then OPM would simply note that the provision in Chapter 75, Subchapter III, governing an action against an administrative law judge, 5 U.S.C. § 7521, itself encompasses "suspensions," id. at § 7521(b)(2), thereby suggesting that an agency would need to obtain an adjudication from the MSPB approving a suspension in order to stop paying an ALJ pending the outcome of any other proceeding against the ALJ. As the term "suspension" is not otherwise defined, for purposes of Subchapter III, however, the MSPB (and the Federal courts in its chain of judicial review) would be the ultimate arbiter of this question.

Mr. ASTRUE. If could I just address that briefly, Mr. Chairman. I actually would have some qualms about taking salary away on administrative leave. Administrative leave in these situations is usually for a brief period of time when you are trying to get a handle on the situation. You have found out there is a problem, and you are trying to freeze the situation to decide what to do. It is not uncommon for someone to be put on administrative leave and then we discover it is a false alarm.

I do think something that the Committee should be considering very closely is that once we have done that and we have made a decision that someone should be removed, for judges but not for other employees, the whole time an MSPB process is continuing, which can take 2 to 3 years, full salary is paid even after a removal order at the first level of determination.

Mr. COBLE. I thank you, sir.

I want my colleagues to know I just barely missed the red light. I almost beat it. You all set a good pattern. Mr. Johnson is recognized for 5 minutes.

Mr. JOHNSON OF TEXAS. Thank you, Mr. Chairman. Commissioner Astrue, it is my understanding the Administrative Procedure

Act protects what an ALJ decides to do because of judicial independence. So whether a judge grants approvals in most cases or denies most claimants or handles too few or in some cases well above the average, the APA prevents Social Security from questioning their decision making, is that true?

Mr. ASTRUE. Mr. Chairman, I think it is a somewhat debatable proposition. I think that our authority is not 100 percent clear. In fact as a technical matter, APA decisions in the court don't apply to us because we are not under the APA. The courts have ruled in the past that the APA was modeled after the Social Security Act and, to a large extent, the systems are parallel and the same rules should apply, but our decisions are made under the Social Security Act.

Mr. JOHNSON OF TEXAS. And you and I have talked about my concerns about low producing and overly generous ALJs for a long time. And our staffs have been working together to determine the impact on the Disability Insurance Program. Of judges whose allowance rates are above 85 percent and judges whose allowance rates are below 20 percent, would you discuss your staff's findings and tell me what effect the union has on that?

Mr. ASTRUE. Sure, Mr. Chairman. We had—and I apologize for the lateness of this—we had some technical issues, and right before the hearing, the actuaries completed those numbers in response to your request. We will be attaching those for the record. But by the standards that you indicated, the 20 and the 85 percent, roughly the savings to the taxpayers on the less generous side is about $200 million a year. The cost on the more generous side is approximately a billion dollars annually. We have it in all its complex glory for you, and we will attach it for the record. But the short version is that there is a substantial cost to the trust funds if you look at it with the standards that you asked us to look at it at.

[The information referred to follows:]

SOCIAL SECURITY

RANDUM

July 7, 2011 Refer To: TCA

Michael J. Astrue
Commissioner

Scott Frey
Deputy Commissioner for
Legislation and Congressional Affairs

Stephen C. Goss
Chief Actuary

Estimates of the Financial Effects on the Disability Insurance Trust Fund of Determinations by Administrative Law Judges with the High and Low Allowance Rates—**INFORMATION**

Administrative Law Judges (ALJs) make disability determinations after a claimant has been found not disabled by disability examiners of the State Disability Determination Services (DDS) at both the initial and reconsideration steps in the adjudication process. In total, ALJs find that claimants are disabled in somewhat over 60 percent of the cases they decide. We refer to this percentage as the "allowance rate." However, there is considerable variation in allowance rates among ALJs. In this memorandum, we analyze data on allowance rates for ALJs, focusing on those with the highest and the lowest allowance rates.

In the background section of the Hearing Advisory for the July 11, 2011 Joint Oversight Hearing on the Role of Social Security Administrative Law Judges announced by Chairman Johnson and Chairman Coble, they make reference to 54 administrative law judges (ALJs) who awarded benefits in 85 percent or more of their cases in FY 2010 and 2 ALJs who denied benefits in at least 80 percent of their cases. You have asked us to assess the potential effects on the financial status of the Disability Insurance (DI) program if ALJs with allowance rates at these extremes had, instead, made allowances at rates equal to the national average.

Glenn Sklar, Deputy Commissioner for Disability Adjudication and Review, provided us with data on ALJ determinations for fiscal years 2009 and 2010. The overall allowance rate for all ALJs combined was 63.32 percent for FY 2009 and 62.21 percent for FY 2010 for Social Security determinations. For each year, we considered all ALJs who had at least one Social Security disability determination. In 2009, 1,346 ALJs made at least one Social Security disability determination. In 2010, 1,394 ALJs made at least one Social Security disability determination.

The attached table provides our findings for ALJs with allowance rates of 85 percent or higher, and for ALJs with allowance rates of 20 percent or lower (and thus denying or dismissing 80 percent or more of their cases) in these two years. We find that the number with allowance rates of 85 percent or higher declined from 124 ALJs in 2009 to 83 ALJs in 2010. The number with allowance rates of 20 percent or lower declined from 22 ALJs in 2009 to 15 ALJs in 2010.

In order to quantify the effect on DI program cost of potentially altering the outcomes for ALJs with these high and low allowance rates, we assumed that the relative distribution of ALJ dispositions by allowance rate has been in the past and will be in the future about the same as in the FY 2010 experience. The attached table shows that if the high-allowance ALJs in FY 2010 had instead allowed the same percentage of their cases as the average for the year, total DI disability allowances would have been about 0.79 percent lower. If the low-allowance ALJs in FY2010 had instead allowed the same percentage of their cases as the average for the year, total DI disability allowances would have been about 0.12 percent higher.

On the assumption that the FY 2010 distribution of ALJ dispositions by allowance rate is typical of the past, on average, we estimate that if the high-allowance ALJs (85 percent or higher) had instead been average (62 percent allowance rate), the 0.79 percent reduction in overall allowances for the DI program would lower the program cost of $129 billion for calendar year 2011 by about $1.0 billion. Over the long-range 75-year period, assuming a similar change in future ALJ allowance rates for those with high allowances, we estimate the long-range DI program cost of 2.21 percent of taxable payroll would be reduced by about by about 0.02 percent of payroll.

On the assumption that the FY 2010 distribution of ALJ dispositions by allowance rate is typical of the past, on average, we estimate that if the low-allowance ALJs (20 percent or lower) had instead been average (62 percent allowance rate), the 0.12 percent increase in overall allowances for the DI program would increase the program cost of $129 billion for calendar year 2011 by about $0.2 billion. Over the long-range 75-year period, assuming a similar change in future ALJ allowance rates for those with low allowances, we estimate the long-range DI program cost of 2.21 percent of taxable payroll would be increased by a negligible amount (less than 0.005 percent of payroll).

Stephen C. Goss

Stephen C. Goss

cc:
Jo Tittel
Glenn Sklar
Dean Landis
Tom Parrott

Attachment

Administrative Law Judge OASDI Dispositions

ALJs with At Least One OASDI Disposition in the Fiscal Year

	All ALJs	ALJs with 85 Percent or Higher Allowance Rate	ALJs with 80 Percent or Higher Denial/Dismissal Rate
		Fiscal Year 2009	
Number of ALJs	1,346	124	22
Number of Dispositions	460,201	37,788	2,710
Number of Allowances 1/	291,384	33,723	408
Number of Denials/Dismissals	168,817	4,065	2,302
Allowance Rate	63.32%	89.24%	15.06%
		Change If Had Average Allowance Rate	
Change in Number Allowed		-9,797	1,308
Percent Change in---			
Total ALJ Allowances		-3.36%	0.45%
Total All DI Allowances		-1.03%	0.14%
		Fiscal Year 2010	
Number of ALJs	1,394	83	15
Number of Dispositions	490,384	30,102	2,617
Number of Allowances 1/	305,071	26,765	414
Number of Denials/Dismissals	185,313	3,337	2,203
Allowance Rate	62.21%	88.91%	15.82%
		Change If Had Average Allowance Rate	
Change in Number Allowed		-8,038	1,214
Percent Change in---			
Total ALJ Allowances		-2.63%	0.40%
Total All DI Allowances		-0.79%	0.12%

1/ Fully or partially favorable award

Office of the Chief Actuary
Social Security Administration
July 7, 2011

Mr. JOHNSON OF TEXAS. Since people don't appeal awards there is no way to know which appeals were wrongly awarded, is there?

Mr. ASTRUE. As of fairly recently, we are looking at them and are using that data for training and counseling, but in terms of reversing decisions you are correct, Mr. Chairman.

Mr. JOHNSON OF TEXAS. Do you look at every decision? Review it, somebody?

Mr. ASTRUE. Not me personally. We look at a statistical sample from the point of view of trying to identify patterns of disconnect with the law. Again, that is fairly recent, and we only look at a relatively small sample. We don't have the resources to look at very many, but we do look to find the most extreme cases of noncompliance with the statute and try to address them through training and then, if training doesn't work, through counseling.

Mr. JOHNSON OF TEXAS. When a new judge is hired can you put them on probation? If not, why not?

Mr. ASTRUE. No, the statute doesn't allow me to do that, Mr. Chairman.

Mr. JOHNSON OF TEXAS. Does OPM do background checks on candidates before they are placed on the register for you to interview and have you ever asked them to do that?

Mr. ASTRUE. The answer to the first question is no, they don't. Yes, we have asked them to do it in the past. We have gone ahead and done it on our own.

Mr. JOHNSON OF TEXAS. What is their response?

Mr. ASTRUE. We have actually used contractors to do it as opposed to having agency officials do it.

Mr. JOHNSON OF TEXAS. What was their response to you?

Mr. ASTRUE. They declined to do it.

Mr. JOHNSON OF TEXAS. You want to respond?

Ms. GRIFFIN. This is in preparation for this hearing, this is something that we looked at. And we have right now, I think there are approximately 900 ALJs on the list. So in order to do a suitability background check on every single one of these people when the majority of them aren't going to end up being ALJs given the number that are hired each year is cost prohibitive. It would actually cost the Commissioner and all the other agencies that pay for this service a lot more. What we do suggest and what we do with all Federal employees is that they have a suitability check when they are offered the job. So the offer is always conditional on a background check of some type, depending on the level of work they are going to be doing, all the way up to—depending on the type of clearance we need. So I think the appropriate time to do is before they are offered and before they actually begin the job.

Mr. ASTRUE. Just to be clear, we do not in the agency check everyone on the list. It is only when they are sent to us by OPM for potential hire. It is at that time when we do the background check.

Mr. JOHNSON OF TEXAS. Thank you.

Mr. GOWDY. [Presiding.] Thank you. The gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON OF GEORGIA. Thank you, Mr. Astrue, there have been a number—or there has been some additional funding provided by earlier Congresses and based on that additional funding and very hard work by SSA judges and hearing office staff, the

wait times have gone down from a peak of 18 months and that was in 2008 to just below the 1 year mark last month; is that correct?

Mr. ASTRUE. Yes.

Mr. JOHNSON OF GEORGIA. And unfortunately Republicans this year chose not to continue helping SSA bring down wait times by cutting the agency's budget by $1 billion below what was requested to keep up with incoming claims and drive down waiting times. What will be the impact across the agency of this kind of cut?

Mr. ASTRUE. Well, certainly this year halfway through the fiscal year we started implementing——

Mr. JOHNSON OF GEORGIA. This is going to hurt, isn't it, in terms of your ability to quickly——

Mr. ASTRUE. I am trying to get to that, Mr. Johnson. Yes, it has hurt. As one of the Members, I don't remember who mentioned—I think it was Mr. Becerra—we have canceled office openings, we have closed the McLean case assistance center, and that is in the area which is our number one priority. I have heard complaints from many of you because we closed remote offices.

Mr. JOHNSON OF GEORGIA. I don't want to go that far now because I only have 5 minutes and I don't want you to filibuster me.

Mr. ASTRUE. I am not filibustering you. I am trying to be responsive, Mr. Johnson.

Mr. JOHNSON OF GEORGIA. Let me ask this question. Have you noticed a tsunami of ALJs recently who seem to go too far in allowing awards or who are nonproductive in terms of low producers?

Mr. ASTRUE. We are actually as——

Mr. JOHNSON OF GEORGIA. Has there been an avalanche or has it been just a trickle?

Mr. ASTRUE. Well, in fact there has been slight improvement in both categories and I think a lot of that is because we have hired 685 ALJs on my watch. And if you look at the performance of those 685, there are fewer of them at the extremes in decision making, and there are fewer of them on the nonproductive end. So I think it bears out what I said in my testimony, committing to excellence——

Mr. JOHNSON OF GEORGIA. I am sorry.

Mr. ASTRUE. It is a better product.

Mr. JOHNSON OF GEORGIA. Sorry for interrupting. I did want to just continue with my questions. So we are having a hearing on ALJs today and it appears to be no real problem that we should be having a hearing on; is that fair to say?

Mr. ASTRUE. I think if you look at this historically, this is an issue that has been periodically before the Congress for 35 years.

Mr. JOHNSON OF GEORGIA. It——

Mr. ASTRUE. It has been a source of concern of Members of both parties for a long period of time.

Mr. JOHNSON OF GEORGIA. We should not cause any panic among the public insofar as the abilities of our ALJs is concerned handling the Social Security claims. There is no real need to make them a whipping boy or girl, is it?

Mr. ASTRUE. I have never made anyone a whipping boy or a whipping girl. I think what is important is that judges perform an important public function. They should work hard, they should be-

have properly, and they should decide cases in accordance with the law.

Mr. JOHNSON OF GEORGIA. How many of those types of judges who have not met that benchmark have you had to compel to go into training or counseling during your tenure?

Mr. ASTRUE. Well, during my tenure we have disciplined 58 judges.

Mr. JOHNSON OF GEORGIA. Fifty-eight have been disciplined out of 85 percent of 1,704?

Mr. ASTRUE. When I first started, we had about a 1,000 ALJs. We have about 1,400 now.

Mr. JOHNSON OF GEORGIA. And they were disciplined for being excessive in terms of one way or the other which way they ruled?

Mr. ASTRUE. No, we haven't disciplined any judges for that.

Mr. JOHNSON OF GEORGIA. Disciplined because of failure to decide cases?

Mr. ASTRUE. We have had some disciplined for failure to decide cases, yes.

Mr. JOHNSON OF GEORGIA. About how many?

Mr. ASTRUE. After repeated warning, one certainly comes to mind, and I will answer for the record how many others fell in that category.

[The information referred to follows:]*

Insert for Page 43, line 952

Between 2006 and present, through the MSPB process, we have disciplined 9 ALJs for failing to follow directives to effectively manage the cases assigned to the them. The ALJs received the following discipline:

- 1 ALJ was removed,
- 1 ALJ is pending removal,
- 3 ALJs received suspensions, and
- 4 ALJs separated from the agency prior to removal (3 retired, 1 died).

In addition, we reprimanded 7 ALJs for failure to follow directives to effectively manage the cases assigned to them. The Regional Chief Administrative Law Judges issue reprimands. The MSPB is not involved.

Mr. JOHNSON OF GEORGIA. And the others were for things other than the substance of the cases that they decided?

Mr. ASTRUE. We haven't disciplined any judges yet on the substantive cases.

Mr. JOHNSON OF GEORGIA. Thank you.

Mr. GOWDY. I thank the gentleman from Georgia. The Chair now recognizes the gentleman from Nebraska, Mr. Smith.

Mr. SMITH OF NEBRASKA. Thank you, Mr. Chairman. Commissioner, you have asked the ALJs to make approximately 500 to 700

*Note: The page and line number notation are a reference to the original transcript.

decisions every year, and why would you say that it was necessary to establish that expectation?

Mr. ASTRUE. We decided that you can't do everything by rules and directives, that a part of change is cultural change. And so one of the interesting things about this very effective memo is that there are no sanctions attached to it. So the combination of saying this is what we expect and being much more open about performance, I think a significant number of judges to their credit said, I am being challenged by the Commissioner to do better, and I am going do better, and I applaud those judges who have done that.

Mr. SMITH OF NEBRASKA. So how would you describe the analysis that the agency used in deciding on that number—those numbers?

Mr. ASTRUE. We had old data that I don't think was very relevant that suggested that a number a little bit below 500 might be appropriate. We relied on the professional judgment of our management judges saying, among the people who are doing the best, what are they doing, what is a reasonable expectation? We relied heavily on former Chief Judge Frank Cristaudo and decided that 500 to 700 cases as a benchmark was a fair and reasonable benchmark.

Mr. SMITH OF NEBRASKA. Okay. So, if my math is correct, approximately 350 judges are not meeting the expectation?

Mr. ASTRUE. Yes.

Mr. SMITH OF NEBRASKA. And what do you think is necessary to ensure that the expectations can be met?

Mr. ASTRUE. There are some judges who haven't met the 500 but seem to be trying in good faith and are close. There are some that have had health or other issues that are reasonable excuses. We have, I believe, 118 judges who are eligible for reduced time because they are union representatives.

If you look at the few judges apart from those categories, who are not fully carrying their weight, it is a relatively small number, but we will be taking an increasing amount of action there. We have clarified our regulatory authority with the time-and-place regulation. And, as I indicated in my testimony, we will be filing shortly against a judge purely for nonperformance based on the total lack of productivity.

Mr. SMITH OF NEBRASKA. Okay. Now, their compensation is based on a salary schedule type of approach, is that accurate?

Mr. ASTRUE. Yes, that is right.

Mr. SMITH OF NEBRASKA. And so it is conceivable that some judges would be paid the same as those they supervise?

Mr. ASTRUE. Yes, that is right. There is pay compression there, and I think that is an issue that OPM and the Congress should be considering. Because, right now, there is no incentive to be a management judge. And believe me, there is a lot of heartache, I was a general counsel for over 10 years in government and outside government. There is a lot of heartache managing lawyers in any area. And I think that some differential for the added management responsibilities is an appropriate issue to consider.

Mr. SMITH OF NEBRASKA. And what, specifically, do you think would work that we could implement via statute or however?

Mr. ASTRUE. My understanding is that it may require a statutory change. So that is one of the things where we would like to work

with OPM and with you, the Members of Congress, to see if there is a better way moving forward.

Mr. SMITH OF NEBRASKA. Okay. All right. Thank you.

I yield back.

Mr. GOWDY. The Chair thanks the gentleman from Nebraska and recognizes the gentleman from California, Mr. Becerra.

Mr. BECERRA. Thank you for your testimony here.

Commissioner, thank you for the work that you have been doing to try to address this issue of outlier judges. And I hope that we are able to hear soon the results of some of these investigations and examinations that are under way so we can deal with that.

I also know that a lot of these judges are under extreme stress. They are dealing with a huge number of cases on a daily basis that they must dispose of and do so in a not just reasonable way but in a legal way.

I know that you say in your testimony, your written testimony, you mention that your number-one priority is trying to relieve this backlog. And I know you have made some progress. You state specifically—I am quoting you—"Eliminating our hearings backlog and preventing its reoccurrence remains our number-one priority."

You go on to cite on page 4 of your testimony, "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."

Now, we all remember the bad old days back in 2005, 2006, 2007. In your testimony, you go on to say, "In 2007, we had claimants who waited for a hearing decision for as long as a staggering 1,400 days." I don't think any of us wants to go back to those days again.

You then go on in your testimony on page 6 to say, "However, to continue our progress, we need Congress' help. We must receive full funding of the FY 2012 President's budget request," which, by the way, is $12.5 billion. Let me repeat your words: "We must receive full funding of the FY 2012 President's budget request."

You go on to say, "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. The gains that we achieved will vanish. The additional funding we received in recent years was critical to achieving our success to date."

Now, I mentioned previously that you got more money in 2008, you got more money, much of it through the economic recovery package in 2009 for 2010 as well. But last year, your budget was cut from what you needed, a billion dollars less. Now, you have done, I don't know how, but an admirable job of doing without that billion dollars that you needed. I am hearing you now that you are saying, we got to get what the President said, 12.5 billion.

Now, I know you had to spend some of your reserve money in order to boost up the amount that you got from Congress for 2011 funding. That means you have less money in reserve to do some

of those things that sometimes you are able to do because you have the reserve.

Mr. ASTRUE. Actually, Congress took the reserve money away. So we don't have that anymore either.

Mr. BECERRA. That is correct. The 2011 budget also took from you several hundred million dollars.

The results? Well, you have mentioned the eight offices, hearing offices, that you were planning to open—no longer. I suspect that if you don't get the money that the President has requested on your behalf, you likely will have to look at a hiring freeze?

Mr. ASTRUE. We have been in a full hiring freeze for this entire fiscal year. We actually started a substantial hiring freeze even before the start of the fiscal year, being concerned that——

Mr. BECERRA. Furloughs? Will you have to consider furloughs?

Mr. ASTRUE. Well, we were very close. In April, we believed that we were looking at 8 to 12 furlough days.

Mr. BECERRA. Had you not used some of your reserves to cover some of your expenses, would you have had to consider furloughs?

Mr. ASTRUE. I don't want to make a mistake on an important question. Let me supply that analysis for the record.

Mr. BECERRA. Okay.

[The infromation referred to follows:]*

Insert for Page 51, line 1114

In FY 2011, we expect to use about $405 million in Information Technology (IT) no-year funds. If those funds were not available to us, we would have had to use our regular appropriation to cover all of our basic IT expenses, leaving us with significantly less funding to pay other expenses. As a result, we would have had to consider furloughs along with other undesirable options, which would have a deleterious effect on both service to the public and our cost-effective program integrity work.

A furlough day saves approximately $25 million. Each furlough day would result in approximately 19,000 retirement claims, 11,000 initial disability claims, and 3,000 hearings we would not be able to complete. In addition, each furlough day would result in approximately 2,400 periodic medical CDRs and 10,500 SSI redeterminations that we could not complete, work that more than pays for itself and is vital to protecting taxpayer dollars.

Mr. BECERRA. Is it possible for you to tell us today that you will continue to make progress in reducing the backlog—the backlog that obviously impacts the workload of each one of those administrative law judges, and certainly it impacts the American workers who are making the requests for the benefits that they believe they are entitled to. Does not getting the money that the President and you have requested impact your ability to meet that process?

Mr. ASTRUE. Absolutely. The Congress has, quite understandably, wanted to verify that we were making the progress that we told you we were making. So GAO told you a couple of years ago that we were 78 percent likely to make the goal. More recently, the

*Note: The page and line number notation are a reference to the original transcript.

IG said that we were on target but we were very fragile, that 1 percent either way and we would miss the goal.

Right now, with the budget numbers that I am hearing from the Hill, which are another absolute reduction in numbers, I can guarantee you that we will miss at that level. I also close to guarantee you that we will make it with the President's budget. We are still in the game on that.

So, really, you know, my view is, it is up to Congress to decide how important is backlog reduction. I came here to do this 5 years ago and said I would do it. Not many of you believed me. We are on the verge of getting there. And if we miss it, it is not because I failed. It is not because any of the people sitting behind me or any of the 85,000 people who work for us have failed. It is because Congress chose to fail. And it is up to all of you.

Mr. BECERRA. Thank you, Mr. Chairman.

Thank you for your testimony.

Mr. GOWDY. I thank the gentleman from California.

The Chair would now recognize the gentleman from Texas, Mr. Brady.

Mr. BRADY. Thank you, Mr. Chairman. I appreciate you all holding this joint hearing today.

Just to sort of correct the record, it sounds like the 2011 budget was devastating to Social Security. First, you have to ask, which President signed that bill? It was President Obama, if I recall. And which Senate passed that bill? It sounded like it was the Senate Democrats. If I recall——

Mr. ASTRUE. So——

Mr. BRADY. Commissioner, just hold on.

Mr. ASTRUE. Okay.

Mr. BRADY. If I recall, it passed that funding bill, bipartisan, passed 260 to 167, with 81 Democrats in the House, including the Ranking Member of Ways and Means, supporting that bill. It was a bipartisan effort to try to get this terrible deficit under control.

And I would also point out that in the past decades, the Social Security Administration stockpiled over $1.3 billion in the information technology fund, reserve fund. In a bipartisan way, Congress agreed to rescind about less than half of that, $500 million, of the unused fund. Clearly, resources matter. But it is not the only reason for the progress that is being made at SSA.

I think, looking overall, that you are making progress in speeding up the hearing times, increasing the productivity of judges. And that is to be commended in a major way. But a lot of concerns still remain: the variations between the States' DDS. I still question the value of the reconsideration process at the DDS level, and I would be curious to hear what the 10 prototype States—what the impact of skipping that step has been.

I still think too many cases go to the ALJ hearing levels. It increases the cost by three times, lengthens those decisions dramatically. Still has to be a better way of resolving these cases before they get to that level.

There continue to be dramatic variances between offices, some in the same community. In the Houston area, the difference between our downtown office and our Bellaire office is dramatic.

And I still heard, over the holidays, two complaints from claimants about their representatives who, they believe, were actually slowing down the process of resolving their claims. And I still am concerned we don't have the right incentives in place to move—for the claimants' representatives to help resolve these processes sooner rather than later.

So, Commissioner, starting with making sure we have good candidates and a good registry for our administrative law judges—I disagree with the thought that we ought not have a specific test that tests specific substantial knowledge of the technical aspects of Social Security Disability.

So I would ask you, Commissioner, have you found candidates who pass the exam and make the register but who aren't suited to handle a high caseload or aren't suited to dealing with the public?

Mr. ASTRUE. Absolutely. We have had people with criminal records, failure to pay taxes. The reason we spent a substantial amount of money on the background checks is that it is cost-beneficial. It is much better to screen out the bad actors early and not allow them on the bench than to chase them down years later, spending millions going before the Merit Systems Protection Board.

So, as I said, the background checks that we do on judges are one of the most cost-efficient things that we do in the entire agency.

Mr. BRADY. Since we are—we select the majority of those on the registry, have you asked OPM for a separate test related to SSA Disability for those candidates?

Mr. ASTRUE. No, I have not.

Mr. BRADY. Will you?

Mr. ASTRUE. I would like the testing of the judges to be more of a partnership than it has been in the past. I think that Director Berry is trying to move it in that direction, but we are not where I would like to see us be yet. I think that is more important than a separate test.

Mr. BRADY. Okay.

Deputy Director Griffin, why doesn't OPM have a separate performance management system for ALJs, one that, obviously based on law, applies to all within the system, but that helps us identify those performance measures quicker and more clearly?

Ms. GRIFFIN. Well, I know that OPM is very interested in performance management and getting good Federal employees hired and have them perform appropriately and do their job very well while they are working for the Federal Government. But we are a little hamstrung with regard to the ALJs and what is allowed by law and what our role can really be.

Our role is actually to develop the list, get good, qualified people, the best that we can find, to put on that list so that the other agencies can hire them. It is really the agency's responsibility to then develop what the measures of performance should be for whoever their Federal employees are.

Mr. BRADY. Wouldn't you think it would be helpful to know, as you are developing that registry, who and who has not worked out so that your screening and your testing and your application process can better reflect those who are likely to succeed, correct?

Ms. GRIFFIN. Well, we have a process by which we try and do exactly that. So we try and make sure that we have people that are qualified to do this work, that have experience and licensing to do the work. Every time we have changed the exam, we do engage with Social Security. And, again, we have just begun in the last few months to do that. That was one of the recommendations in the GAO report, that we do another analysis, job analysis.

So every time I think we do that, we do get better at providing an examination that really, hopefully, gives us the best ALJs on that list that the other agencies can choose from.

However, again, the specific criteria by which someone should be judged as to whether they are doing their job well or not is really left up to the agency. We are developing a list that is available to 27 different agencies that hire ALJs. So we are trying to find the best people that have the best legal skills to do that work.

Mr. BRADY. Sure. Thank you.

I yield back. I have exceeded my time, Chairman.

Mr. GOWDY. I thank the gentleman from Texas.

The Chair would now recognize the gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

I came back early for this hearing because I think this is perhaps among the most important areas that we do work in. There is nothing more frustrating for me, as a Member of Congress, than looking at an applicant for Social Security, or Social Security Disability in particular, and telling him or her that he or she has to wait 18 months, 3 years sometimes, get in a queue, because we can't get decisions.

I thought this hearing was going to be about trying to diminish that waiting time further and that we—I am encouraged to hear that we are moving in the right direction. I am discouraged to hear that we may be in the process of blaming the backlog and the failure to diminish the backlog on some bad apples in the administrative law judge ranks. I think that is a problem, and if it is a problem, we certainly need to address it. I am not sanctioning bad decisions, disproportionality in outcomes.

But if Congress is making decisions to diminish the funding for this agency and then turning around and blaming the increase in the backlog on, what, 50-some administrative law judges out of 1,400 that may not be performing up to standards, then I am disappointed that that is where this hearing is headed.

So I am hopeful that out of this won't come our going out and saying that the reason that we have this massive backlog in Social Security Disability claims is because we have bad judges. And, you know, we have some bad judges, and I think we need to deal with that. But if anybody is telling the American people that that is the only problem that is creating our backlog, then I think we are doing a disservice.

And if we are going to walk out of here and say, you know, we cut the budget by a billion dollars and we are getting ready to take the reserves and cut the budget even further, and all of a sudden the problem is we have some bad judges over there, I can't help you message that. If you want to deal with the bad judges, I want

to help the message that we need to deal with the bad judges, but we have to step up and live up to our responsibilities, too.

I heard Mr. Brady say that there is a disparity within inner cities and Bellaire. That probably means the people out in Bellaire are getting better medical care and better decisions from their doctors about what their problem is than—and that is a real problem in this process.

So I stayed here to try to clarify the record. I don't have a dog in the fight between whether it is a budget issue or bad judges. I think it is both of them. And I think it is inexcusable to have people who are eligible, qualified for Social Security Disability die before they can get the determination made because of this backlog. And I am a lot more concerned about that aspect of the disparity in our system than I am about the judges that are not performing, although I am not excusing them, and I think we need to deal with that too.

But we need to be honest with the American people that we are not doing what we need to do to solve this backlog, and not blaming it on somebody else. We have to step up to the plate and give these people fair hearings by good judges who work, and we have to fund more judges to get this backlog down.

So I didn't ask a question, but I got that off of my chest.

And I thank you, Mr. Astrue, for getting this backlog down and continuing to work on it and being straightforward in your testimony, written testimony, about the fact that you need this funding if you are going to keep moving it in the right direction. Because if we don't move it in that direction, we will be back here blaming somebody else for what we didn't do.

Mr. Chairman, I yield back. Thank you.

Mr. GOWDY. I thank the gentleman from North Carolina.

The Chair would recognize himself for questions.

The gentleman from North Carolina made reference to fair hearings, and I want to ask you about that, some systemic things that ideally could be done to streamline and improve the system.

The adversarial system seems to work for everything from shoplifting cases to capital murder cases. Why not here?

Mr. ASTRUE. It has been tried, and it was extremely expensive and not very successful. There was a government representative project that was actually terminated when I was working for the Commissioner almost 25 years ago. It didn't change outcomes very much. You would need to add another 1,500 employees or so at a time when we don't have the resources to do that.

And I think that we in the agency and I think the Congress, at least implicitly at the time, agreed that the non-adversarial model, given the nature of disability, while not perfect, was the best way to proceed. And that is what I believe.

Mr. GOWDY. Well, who cross-examines the physicians that assign some level of disability to a claimant?

Mr. ASTRUE. That is what the judges do.

Mr. GOWDY. They cross-examine a physician or they cross-examine an affidavit?

Mr. ASTRUE. No, it is a live hearing. The first two levels—or first level in a prototype state—are an entirely paper process. At a hearing—and the judges have latitude, and they do it——

Mr. GOWDY. What is the standard of proof required at the first two stages? Preponderance?

Mr. ASTRUE. I believe that is correct. I don't want to make a mistake on that, so I will supply that information for the record. But, yes.

[The information referred to follows:]*

Insert for Page 61, line 1373

Disability determinations at the initial and reconsideration levels are based on a preponderance of the evidence. This standard also applies to hearing-level decisions.

Mr. GOWDY. So if it is approved at the initial stage, can it ever be reversed in one of the three subsequent appellate stages?

Mr. ASTRUE. No, not under the current process.

Mr. GOWDY. And there are four stages by which it can be granted, correct?

Mr. ASTRUE. Substantially true. We have 10 States—one of the Members, I believe it was Mr. Brady, mentioned before that there are 10 prototype States, where the reconsideration stage has been dropped. But in most of the country, yes, there are four levels.

Mr. GOWDY. So there are four stages at which it can be granted and one stage at which it can be denied?

Mr. ASTRUE. Well, it can be denied at any point. I mean, people bring denials up.

Mr. GOWDY. But nobody appeals it.

Mr. ASTRUE. Yes, that is right. If you are saying, is there a tilt in the system in the direction——

Mr. GOWDY. That is sort of what I am suggesting.

Mr. ASTRUE. Yes, that is right.

Mr. GOWDY. So judges are in the unique position of both being questioner and final arbiter. Is there any other system, justice system, administrative system—I am not familiar with that model, where the judge is the questioner and then ultimately the finder of fact.

Mr. ASTRUE. I am a little bit away from my hardcore administrative law work. I believe that there are parallel systems, some of the continental systems. But it is an unusual system here in the United States.

Mr. GOWDY. All right.

There are four levels of appeal. Why so many?

Mr. ASTRUE. It is a decision by the Congress—

Mr. GOWDY. Would you support a decision to shorten it to two?

Mr. ASTRUE. Well, I have to get to three first. And I think that, in recent years, I have generally been supportive of bringing reconsideration back, because I think that the first level wasn't accurate enough to get rid of reconsideration. But I do think there is some reason to hope that, after I am gone, that you may decide that it is appropriate to do that.

And a couple things are changing. We have much better systems in the DDSs. Our quality rate—because we are very dedicated to

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*Note: The page and line number notation are a reference to the original transcript.

quality—had plateaued at about 96 percent at the DDSs. We have climbed up to 98 percent, largely because of these expert systems that are cueing largely inexperienced examiners on what they need to know, what they need to do.

But I think the next step—and this is really important for us—is when health IT comes. We spend an enormous amount of time, money, and energy, and we make a lot of our mistakes because of incomplete medical records. It is going to take a while for it to come, and it will take a while to get the kinks out of the system. But I think with the combination of the quality improvements that we have made, when the health IT comes in about 2 or 3 years, I think it will be realistic to talk about eliminating reconsideration at that stage.

Mr. GOWDY. And I have about 30 seconds. Are private attorneys used, and in what percentage of the cases?

Mr. ASTRUE. About 75 percent of the claimants use attorneys. About another 10 percent use lay representatives.

[Additional information follows:]*

Insert for Page 64, line 1435

When pursuing a disability claim, claimants may use an attorney or a non-attorney representative. In fiscal year 2010, about 80 percent of all claimants who received a hearing level disposition had some type of representation.

Mr. GOWDY. And how were those attorneys compensated?

Mr. ASTRUE. It gets a little complicated. But, basically, up to certain limits, they take a percentage of the back due payment from the claimant.

Mr. GOWDY. But the claimant needs that money, right, for medical bills or expenses?

Mr. ASTRUE. Yes, these kinds of things are a tradeoff between access to the benefit and——

Mr. GOWDY. Right. And the other tradeoff is despite the fact that we may not think it is fiscally responsible to have another person in the room advocating on behalf of the taxpayer. That would be another fiscal tradeoff, wouldn't it?

Mr. ASTRUE. It is reasonable to take a look at, but, again, I would urge you to go back—we have run this experiment once before, and the agency, I believe in 1987, terminated it. And I think there were some valid reasons for why it was terminated.

Mr. GOWDY. The Supreme Court just decided that there will be attorneys at all magistrate-level criminal cases, where the most you could get is a fine. And the counties and the States have to provide for public defenders in magistrate-level cases. So, apparently, justice has no price tag. And I can't help but think that an adversarial process might result in something other than a 100 percent approval rate, like the one we had in West Virginia.

I have a colleague who is on his way. I would ask you for your—the gentleman from Florida, Mr. Ross.

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*Note: The page and line number notation are a reference to the original transcript.

Mr. ROSS. Thank you, Mr. Chairman. I appreciate your patience here.

Commissioner Astrue, these are non-adversarial proceedings, right?

Mr. ASTRUE. That is correct.

Mr. ROSS. So the judges really take the role of almost being an advocate for the petitioner. Is that correct?

Mr. ASTRUE. Yes, that is correct.

Mr. ROSS. Interesting, I guess the statistics are such that, in 2010, almost 22 percent of cases appealed to the appeals court were remanded back to the hearing level, and 45 percent of cases appealed to the Federal courts were remanded back.

It doesn't sound like the best batting average for them, does it?

Mr. ASTRUE. No, I agree. And we have been working to try to reduce the remand rate at both levels. We haven't made the progress yet that I would like to see.

Mr. ROSS. And what has been the basis for the remands? I mean, has it been just a misapplication of law?

Mr. ASTRUE. We believe that the standard seems to have changed. The Federal district court judges are not hearing as many of these cases. They are being delegated to magistrate judges. And they seem to be applying a different standard than historically. And they seem to be much more likely to remand cases than Article III district court judge.

Mr. ROSS. I was going to say, close to 50 percent are being remanded. Not a good record.

Now, I understand also that the ALJs are unionized? I mean, they——

Mr. ASTRUE. Yes, that is correct.

Mr. ROSS [continuing]. Have their own union. Have there been any conversations with the union as to probably performance assessments, things of that nature, to try to enhance or at least increase the performance level of the ALJs?

Mr. ASTRUE. My understanding is we are statutorily barred from doing that.

Mr. ROSS. Why is that? I mean, you are statutorily barred from having any performance evaluations whatsoever?

Mr. ASTRUE. Performance reviews, yes, that is correct. That is your decision, not mine.

Mr. ROSS. Okay. Because when I was here for the openings and Ms. Griffin commented that the accountability, that I guess they—how do you create accountability?

Ms. Griffin?

Ms. GRIFFIN. There is a variety of ways you can do it. And I think you can look at some of the other agencies that have ALJs that look at—they look at error rate.

And I think some of what Commissioner Astrue is doing is looking at a variety of things—giving people training, giving them chances to become better ALJs. And then, at some point, if somebody can't, you take the actions that are appropriate.

Mr. ROSS. But has the union made any comment on how to enhance performance? Have they come up with any suggestions? Internally, obviously, you know, not from others.

Mr. ASTRUE. They have made suggestions about adopting certain ethics rules and things like that. But in terms of actual performance reviews, my understanding has always been that they are opposed to that.

Mr. ROSS. And flexiplace or flex-place? That is one of the options where they can work out of the home?

Mr. ASTRUE. Yes, that is an option that they have now.

Mr. ROSS. So how would that work? Would they still conduct hearings out of their home through videoconferencing?

Mr. ASTRUE. Right now, as I understand it—if I am making a mistake on the collective bargaining agreement, I apologize and will correct it for the record—but they are entitled under the collective bargaining agreement that I inherited to do a minimum of 4 hours of flex-place each week and possibly have more than that, depending on the negotiation within the hearing office.

[Additional information follows:]*

Insert for Page 68, line 1536

Under the current collective bargaining agreement, ALJs may work at least four days per month at an alternate duty station but may not schedule more than two consecutive days within a work week.

Mr. ROSS. Now, I guess there is, what, 26 percent of the ALJs who are not meeting the minimum performance standards; is that correct? Has the union offered in any way whatsoever to help correct that?

Mr. ASTRUE. No.

Mr. ROSS. Has it even been a topic of conversation within the union?

Mr. ASTRUE. No.

Mr. ROSS. Don't you think that that is something that ought to be addressed? I mean, if the efficiency and performance of the ALJs really is at issue here, would not it be in the best interest of the union that represents them to want to at least suggest and even advocate such a process?

Mr. ASTRUE. Yes.

Mr. ROSS. But nothing is coming about?

Mr. ASTRUE. No.

Mr. ROSS. You have 27 months for a hearing to be resolved——

Mr. ASTRUE. Well, not now. We have brought that down to—we are under 12 months now, 353 days, as of June of this year.

Mr. ROSS. And your goal is for cases to be decided within 270 days?

Mr. ASTRUE. Two-seventy is the goal, yes.

Mr. ROSS. And, again, I have to ask with regard to the union's position on this, do they have any position on your timetable of getting it out at 270?

Mr. ASTRUE. Well, I think for a long time they have been denying that we have been succeeding in backlog reduction at all through a rationale that, I have to be candid, I don't understand.

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*Note: The page and line number notation are a reference to the original transcript.

Mr. ROSS. I appreciate that, because that helps me understand too, because I don't understand why it is that way.

Ms. Griffin, any comments with regard to whether you feel the union is doing anything to help the ALJs meet the minimum performance standards?

Ms. GRIFFIN. I couldn't actually speak to that whatsoever because I have no knowledge of Mr. Astrue's and Social Security's relationship with the union.

But I would say this. I think if the ultimate goal is to actually reduce the backlog—and, actually, Chairman Johnson alluded to it in his opening, about some people getting on the rolls because—not because they don't want to work—because they want to work and there aren't opportunities.

We have the ability in the Federal Government, here in Congress too, to hire more people with disabilities. We have a President that actually signed an Executive order last July saying the Federal Government should hire more people with disabilities. And, frankly, if we did a better job of this overall in society and gave people more opportunities, we wouldn't have that many people applying for Social Security, either SSI or SSD.

Mr. ROSS. I see my time is up.

Ms. GRIFFIN. So there is a fix, and we need to do that.

Mr. ROSS. I yield back. Thank you.

Mr. GOWDY. I thank the gentleman from Florida.

I thank both of our witnesses. All of us do, on both sides of the aisle.

I note our colleague, Mr. Berg, wanted very much to come back. He has been detained in another hearing.

So, with that, let me thank our witnesses.

And, without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond to as promptly as they can so their answers may be made part of the record.

Without objection, all Members will have 5 legislative days to submit additional materials for inclusion in the record.

With that, again, I thank both of our witnesses.

The hearing is adjourned.

[Whereupon, at 5:02 p.m., the Subcommittees were adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Letter from Judge Richard A. Pearson, President,
The Federal Administrative Law Judges Conference

THE FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE
P.O. Box 1772 • Washington, DC 20013 • www.faljc.org

July 29, 2011

The Honorable Sam Johnson, Chairman
Subcommittee on Social Security
Committee on Ways and Means
U.S. House of Representatives
Washington, DC 20515

The Honorable Xavier Becerra
Ranking Minority Member
Subcommittee on Social Security
Committee on Ways and Means
U.S. House of Representative
Washington, DC 20515

The Honorable Howard Coble, Chairman
Subcommittee on Courts, Commercial
and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Steve Cohen
Ranking Minority Member
Subcommittee on Courts, Commercial
and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Johnson, Chairman Coble, Representative Becerra and Representative Cohen:

On behalf of the Federal Administrative Law Judges Conference (FALJC), I submit these comments as part of the joint oversight hearing your subcommittees held on July 11, 2011, on the role of administrative law judges in the Social Security Administration. FALJC is a voluntary professional association composed of administrative law judges from the thirty-one federal agencies that employ such judges, and it is the only organization that represents the entire federal administrative law judge community. FALJC was organized more than sixty years ago to preserve the integrity of the administrative adjudication process guaranteed by the Administrative Procedure Act (APA), to represent the concerns of judges in matters affecting judicial independence and compensation, to improve the federal administrative judicial process, and to present educational programs to enhance the judicial skills of administrative law judges.

The independence of our administrative judiciary is the bedrock principle on which the APA was constructed, and Congress should not erode that basic principle in an effort to correct individual problems within SSA or any other agency. Federal administrative law judges derive their powers and judicial independence directly from the APA, and as the Supreme Court has stated, they are the functional equivalent of federal trial judges. When Congress drafted the APA, it recognized that the degree of control then exercised by federal agencies over their hearing examiners (the predecessors of administrative law judges) diminished the parties' assurance that they would receive a fair and impartial hearing. Accordingly, Congress enacted safeguards to ensure the independence of administrative law judges by exempting them from performance evaluations and, conversely, precluding them from receiving bonuses or other

monetary awards. The same considerations apply today. Administrative law judges must maintain their judicial independence in order to resolve proceedings fairly and expeditiously and to maintain the litigants' confidence in the fairness and integrity of the administrative process.

We agree that judicial independence is not a defense for a judge's misconduct. If individual judges have violated their duty to render decisions fairly and in an unbiased manner, the existing disciplinary process is fully capable of correcting the situation; indeed, SSA's Inspector General is already investigating such allegations. We recognize the importance of this process. Nevertheless, it would be wholly improper to discipline a judge based simply on the number of favorable or unfavorable decisions he or she issues, or on the failure to meet a quota of total decisions issued. Similarly, it would violate merit system principles and fundamental fairness to suspend a judge (or any federal employee) without pay until he or she has been afforded a full hearing and found to have committed serious misconduct.

Next, we recommend that any improvements to the Social Security disability adjudication process be tailored to the distinctive characteristics of that system. As you know, SSA disability hearings are not adversarial, as the government is not represented, and there is little opportunity to reverse a judge's decision to grant benefits. At most other agencies, in contrast, parties are represented by counsel and have the right to appeal to the agency head or to an appellate tribunal acting on the agency head's behalf, who can reverse an administrative law judge's decision that does not conform to the agency's regulations, governing statutes or case law. Such self-correcting mechanisms help to ensure consistency and fairness throughout the agency, without sacrificing the decisional independence of individual judges.

Congress may indeed want to consider changes in the system of adjudicating Social Security disability claims, many of which have already been suggested by the Social Security judges themselves. These proposals would, for instance, allow the agency to be represented at Social Security disability hearings and to appeal from decisions granting benefits. However, it is essential to preserve the independence of administrative law judges from the control of their agency over how to decide specific cases, because the hearing before an administrative law judge is the Social Security claimant's only opportunity to obtain a full hearing before a neutral decision-maker. The government's legitimate interest in consistency does not justify the use of managerial techniques that would pressure judges to decide cases one way or the other. Such techniques would erode the independence of all judges and would render the guarantees of a fair hearing and due process illusory. It is not the judges who would suffer from a loss of independence, but rather the litigants and justice.

We understand that the union representing SSA judges for collective bargaining has worked with SSA management in recent years to make significant improvements (both technological and administrative) in the handling of cases and in reducing the backlog of cases awaiting a hearing and cases awaiting a decision. Thus it is inaccurate to blame the Social Security judges or their union for these backlogs, and focusing Congressional or regulatory changes on the administrative law judges will not address, much less correct, the systemic problems that cause the backlogs. The existing civil service law provides SSA with more-than-adequate tools to correct misconduct by individual judges, and SSA management has been quite assertive in pursuing such remedies. Therefore, we strongly suggest that Congress allow SSA to

continue to work cooperatively and constructively with the judges' union and with the judges themselves, in order to identify and correct problems that may arise in the system of adjudicating disability claims.

With regard to the hiring of new administrative law judges, FALJC is working with the Office of Personnel Management to improve the application and examination process and to identify the skills necessary to be a successful judge. One such improvement would be to restore the importance of trial experience as a qualification for taking the examination. However, the criteria used to evaluate applicants for administrative law judge positions should be uniform throughout the Federal Government, and we believe that a specialized examination or register for any one agency would result in the hiring of less-qualified candidates. It would also cast doubt on the independence of administrative law judges by allowing agencies to give undue preference to their own employees, and potentially to circumvent the statutory veterans' preference. We firmly believe that a major strength of the federal corps of administrative law judges is the diverse professional backgrounds of its members, and that a qualified judge can acquire the knowledge needed to adjudicate agency-specific issues in relatively short order. Judges commonly transfer from one agency to another without difficulty, but selective examinations would significantly restrict this process. A unitary, government-wide examination and hiring criteria are important in order to maintain the strict standards and to ensure that federal administrative law judges remain among the most qualified judiciary in the country.

Thank you for giving FALJC the opportunity to submit these comments, and for your consideration of our views. Please do not hesitate to contact me at rickypearson@yahoo.com or (410) 812-0876 if I can be of further assistance.

Very truly yours,

Judge Richard A. Pearson
President

Prepared Statement of the Honorable Randall Frye, President, the Association of Administrative Law Judges (AALJ)

NEWS RELEASE

For immediate release July 11, 2011

Contact: Jamie Horwitz 202/549-4921, jhdcpr@starpower.net

Statement by Hon. Randall Frye President of the Association of Administrative Law Judges (AALJ) On Today's Joint House Oversight Hearing on the Role of Social Security Administrative Law Judges and the Current Backlog of Disability Cases

We are grateful that members of Congress hold the same concerns that the nation's judges share about the backlog of Social Security disability cases. The appropriation of additional funds by Congress in recent years to open new disability courts and to hire more judges and staff has kept the backlog from becoming worse as baby-boomers age and an economic downturn adds cases to our court dockets.

Economic and demographic changes are largely responsible for the current backlog of cases. However, it is easy to blame the productivity of judges for the backlog. There is a built-in tension between the Social Security Administration and the 1,400 judges who hear disability claims and we often are made a scapegoat by the Agency.

A half-century ago, Congress designed the position of United States Administrative Law Judge to protect the public from undue Agency influence in decision-making. Despite the need for judicial independence to give claimants a fair hearing and to protect the U.S.

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Association of Administrative Law Judges Statement July 11, 2011 /Page 2

Treasury, the Agency, through its managers, routinely pressures judges to decide cases without fully developing and reviewing all of the evidence. This is wrong for those who have paid into Social Security throughout their work lives and for U.S. taxpayers. A Judge must have sufficient time to time to properly adjudicate a case when it is valued at $300,000 or more over a claimant's lifetime.

Much can be done to insure fair hearings, to eliminate the backlog, and to avoid undue pressure on judges from the Social Security Administration. Our organization, AALJ, has made recommendations to enact procedural rules to make the hearing process more efficient and effective -- including a recommendation that would require the government to be represented at disability hearings. Right now, the government does not have a representative at the hearings. Meanwhile, more than 85 percent of claimants are represented by outside counsel. Having a government attorney present would bring balance to the adjudicatory process and would make the disability courts more effective and efficient.

In the present environment, there appears to be more concern with numbers and quotas than with quality and the ultimate cost to the taxpayer. We believe steps must be taken to correct this problem by creating an independent corps of United States Administrative Law Judges. Having judges assigned to an organization different from SSA would avoid an inherent conflict of interest and create savings for American taxpayers. There should be a stronger emphasis on due process and protecting the U.S. Treasury, rather than solely focusing on the number of cases adjudicated.

The Association of Administrative Law Judges (AALJ) was founded as a professional association in 1971 to promote knowledge and collegiality among judges and to protect the due process hearing for the American people. Today the organization represents the approximately 1,400 judges who handle Social Security Disability claims. AALJ bargains on behalf of its members with the Social Security Administration. AALJ is an affiliate of the International Federation of Professional and Technical Engineers (IFPTE) and the AFL-CIO.

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Prepared Statement of the Association of Administrative Law Judges (AALJ)

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, COMMERICIAL 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

Prepared Statement of Nancy G. Shor, Executive Director, and Ethel Zelenski, Director of Government Affairs, the National Organization of Social Security Claimants' Representatives (NOSSCR)

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Written Statement for the Record
on behalf of the
National Organization of Social Security Claimants' Representatives

Joint Oversight Hearing on the Role of Social Security Administrative Law Judges

Subcommittee on Social Security
House Committee on Ways and Means

Subcommittee on Courts, Commercial and Administrative Law
House Committee on the Judiciary

July 11, 2011

Submitted by:

Nancy G. Shor, Executive Director
Ethel Zelenske, Director of Government Affairs

* * *

Founded in 1979, NOSSCR is a professional association of attorneys and other advocates who represent individuals seeking Social Security disability and Supplemental Security Income (SSI) disability benefits. NOSSCR members represent these individuals with disabilities in proceedings at all SSA administrative levels, but primarily at the hearing level, and also in federal court. NOSSCR is a national organization with a current membership of nearly 4,000 members from the private and public sectors and is committed to the highest quality legal representation for claimants.

The Subcommittees' focus on issues related to Social Security disability claims is extremely important to people with disabilities. Title II and SSI cash benefits, along with the related Medicaid and Medicare benefits, are the means of survival for millions of individuals with severe disabilities. They rely on the Social Security Administration (SSA) to promptly and fairly adjudicate their applications for disability benefits.

I. THE IMPORTANCE OF MAINTAINING ALJ DECISIONAL INDEPENDENCE

A claimant's right to a *de novo* hearing before an administrative law judge (ALJ) is central to the fairness of the Social Security Administration (SSA) adjudication process. This right guarantees that individuals with disabilities have a full and fair administrative hearing by an independent decision-maker who provides impartial fact-finding and adjudication, free from any agency coercion or influence. The ALJ questions and takes testimony from the claimant and other witnesses, and considers and weighs the evidence, all in accordance with relevant law and agency policy. For claimants, a fundamental principle of this right is the opportunity to present new evidence to the ALJ, testify in person before the ALJ, and receive a decision based on all available evidence.

ALJs are appointed under the Administrative Procedure Act (APA), which guarantees their independence from undue agency influence, as demonstrated by the following requirements:

- The Office of Personnel Management (OPM) – not SSA – conducts the competitive ALJ selection process. While SSA ultimately appoints ALJs, it can only do so from a list of eligible candidates created by OPM.
- ALJs can be removed only for "good cause."
- Most disciplinary actions may be taken only according to standards and procedures established by the Merit Systems Protection Board (MSPB).
- The pay classification system for ALJs is set by OPM, not by SSA, and is separate from the agency's performance rating process.

The critical role that ALJ decisional independence plays in protecting the rights of claimants cannot be underestimated. In the early to mid-1980s, the SSA disability claims adjudication process was in turmoil. In the most detrimental example for beneficiaries, the agency had changed its policy regarding the cessation of disability. As a result, between 1981 and 1984, nearly 500,000 severely disabled beneficiaries who continued to meet the statutory eligibility requirements had their benefits terminated. Legal advocates represented thousands of individuals in appeals of SSA's decision to terminate their benefits because their disabilities had allegedly "ceased." Many ALJs agreed with their arguments that the agency's policy was inconsistent with the Social Security Act and due process and reversed the termination of benefits. Thus, beneficiaries were able to retain the cash and medical benefits vital to their well-being.

There are other examples from this period of ALJs confronting agency policies they considered inconsistent with the Social Security Act, including a clandestine policy to deny and terminate benefits to tens of thousands of seriously mentally ill claimants who did not meet the then-outdated Listings of Impairments. Also at that time, the agency had a policy of non-acquiescence, i.e., not following precedential decisions issued by the U.S. Courts of Appeals in subsequent individual cases. ALJs frequently reversed the lower level administrative decisions because SSA's policies, at that time, were not consistent with the Social Security Act and precedential case law.

During the same period in the mid-1980s, SSA was pressuring ALJs to reduce the rate of favorable decisions. "Bellmon Review" involved SSA targeting the performance of ALJs that it considered to have favorable decision rates that were too "high" and imposing quotas for allowances and denials. ALJs challenged the program in litigation and the agency eventually abandoned the program.[1]

SSA no longer follows these policies. However, the importance of maintaining the APA-protected ALJs in the SSA adjudication process was brought to light within the past few years regarding actions at the U.S. Department of Justice (DOJ). Some federal agencies use non-ALJs as adjudicators and their independence, as a general rule, is less protected than ALJs. One example of non-ALJ adjudicators is Immigration Judges (IJs) in the DOJ. The process for selecting IJs provides a stark contrast to that for ALJs, since, as noted in a recent report by the DOJ Office of Inspector General, the Attorney General of the United States has the authority to manage the selection process and appoint IJs.[2] The report documented an investigation by the DOJ Office of the Inspector General and the DOJ Office of Professional Responsibility regarding possible political influence in the hiring of IJs. The Offices found that certain DOJ officials "violated federal law and Department [of Justice] policy ... by considering political and ideological affiliations in soliciting and selecting IJs, which are career positions protected by the civil service laws."[3]

II. THE IMPORTANCE OF PROVIDING SSA WITH ADEQUATE FUNDING FOR ITS ADMINISTRATIVE BUDGET

For many years, SSA did not receive adequate funds to provide its mandated services, a key reason for the hearings backlog that reached record levels during those years. Between FY 2000 and FY 2007, the resulting administrative funding shortfall was more than $4 billion. The dramatic increase in the hearing level disability claims backlog coincided with this period of significant under-funding. During the period of the extremely long processing times at the hearing level, sometimes as long as three years, the lives of individuals with disabilities came unraveled while they waited for their hearings and decisions - families were torn apart; homes were lost; medical conditions deteriorated; once stable financial security crumbled; and many individuals died.

For several years prior to FY 2011, Congressional efforts to provide SSA with adequate funding for its administrative budget were encouraging. With the funding, SSA was able to hire thousands of new employees, including additional ALJs and hearing level support staff. This additional staff has allowed SSA to make significant progress on the backlog at the hearing level. While the wait is still too long, SSA has been moving in the right direction and is closer to meeting its goals by FY 2013.

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[1] *See, e.g., Association of Administrative Law Judges v. Heckler*, 594 F. Supp. 1132 (D.D.C. 1984).
[2] *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General* (July 28, 2008), p. 71. Available at http://www.usdoj.gov/oig/special/s0807/final.pdf.
[3] *Id.* at 137.

In April 2011, Congress passed a final fiscal year (FY) 2011 budget for the federal government and SSA received nearly $1 billion less than the President's request for FY 2011. This amount is less than SSA's FY 2010 administrative appropriation.

The budget shortfall has already impacted the agency, which in turn, will affect the public, including people with disabilities. SSA has continued the hiring freeze that began in July 2010; delayed the opening of new hearing offices; and diverted resources from information technology projects that would have improved productivity in the future. Recently, SSA announced that its Field Offices would close to the public 30 minutes early each day.

At the hearing level, SSA has decided to close 160 temporary remote sites. These sites included temporary space in hotels, courthouses, schools, and conference centers. Although "temporary," many of these sites have been used for many years, if not decades.

Following a survey of our members, NOSSCR heard passionate complaints about clients who will be affected by the decision to close a particular temporary remote site. They stressed the serious difficulties and hardships that they will face, now that the temporary remote sites have closed. They note that there is almost always no public transportation to the nearest ODAR hearing office that must now be used; that many of their clients are unable to sit for a car ride of that distance; that many of their clients do not drive and are not going to be able to find someone to drive them; and that hearing offices have been providing conflicting and confusing information about the availability of travel reimbursement. In many other temporary remote site situations, ODAR has provided no information about a video alternative.

We agree with Commissioner Astrue's testimony at the hearing that the President's FY 2012 Budget proposal of $12.522 billion for the Social Security Administration is the minimum needed to continue to reduce key backlogs and increase deficit-reducing program integrity work. With this level of funding, SSA could continue to build on the progress achieved thus far, progress that is vital to millions of people who depend on their services, including people with disabilities. This funding level will allow SSA to continue working down disability backlogs, to implement efficiencies in its programs, and to increase program integrity work.

III. IMPROVEMENTS AT THE HEARING LEVEL

Over the years, NOSSCR has made numerous suggestions for improving the disability claims process for people with disabilities. We believe that these recommendations and agency initiatives can go a long way towards improving the process. Our recommendations include:

1. Expanding Internet access for representatives. Under Electronic Records Express (ERE), registered claimants' representatives are able to submit evidence electronically through an SSA secure website or to a dedicated fax number, using a unique barcode assigned to the claim. Many claimants' representatives now use ERE to submit evidence.

SSA also has instituted a process that gives authorized representatives direct access to their clients' electronic folders, allowing them to download the contents through the ERE website. Security and authentication issues have been implemented after a lengthy pilot of the project. Authorized access to electronic folders was recently extended to claims pending at the Appeals

Council level. We believe that the Internet access has made the hearing process more efficient for all parties involved – claimants, their representatives, and SSA.

2. Use of video hearings. Video hearings allow ALJs to conduct hearings without being at the same geographical site as the claimant and representative and have the potential to reduce processing times and increase productivity. We accept the use of video teleconference hearings so long as the right to a full and fair hearing is adequately protected; the quality of video teleconference hearings is assured; and the claimant retains the absolute right to have an in-person hearing as provided under current regulations[4] and SSA policy.

3. Findings Integrated Templates (FIT). FIT is used for ALJ decisions and integrates the ALJ's findings of fact into the body of the decision. While the FIT does not dictate the ultimate decision, it requires the ALJ to follow a series of templates to support the ultimate decision. Representatives can use the FIT template, which is available on the SSA website, to draft proposed favorable decisions and thus expedite the case. The key factor is that FIT does not dictate the decision and we do not support any process that would interfere with the ALJ's independence. However, the vast majority of ALJs now use FIT, with the result that ALJ decisions, on the whole, are better written and provide more justification for the ALJ's findings.

4. Increase the time for hearing notices. We urge that the time for providing advance notice of the hearing date be increased from the current 20 days to 75 days. We believe that this increase will allow more time to obtain medical evidence before the hearing and make it far more likely that the record will be complete when the ALJ reviews the file before the hearing. The 75-day time period has been in effect in SSA's Region I states since August 2006[5] and, based on reports from representatives, has worked well.

5. Complaint process. We have long supported the need to provide a viable process to review allegations that an ALJ hearing was unfair. Some years ago, the Government Accountability Office (GAO) came to the same conclusion.[6]

Under current procedures, representatives dealing with ALJs who appear to be generally biased against claimants for disability benefits often believe there is little recourse to address the bias issue. In 1992, SSA issued interim "Procedures Concerning Allegations of Bias or Misconduct by Administrative Law Judges." 57 Fed. Reg. 49186 (Oct. 30, 1992). While this procedure has never been finalized, those representatives who have attempted to use it have generally found it to be inadequate. Likewise, 20 C.F.R. §§ 404.940 and 416.1440 allow a claimant to ask an ALJ to recuse him or herself; but requests are normally denied or representatives do not even make the request because they believe this approach also is futile. Allegations of bias in a particular case can be raised in an appeal to the Appeals Council and may result in a remand, possibly to a different ALJ.

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[4] 20 C.F.R. §§ 404.936 and 416.1436.
[5] 20 C.F.R. § 405.315(a).
[6] *SSA Disability Decision Making: Additional Steps Needed to Ensure Accuracy and Fairness of Decisions at the Hearing Level*, GAO-04-14 (Nov. 2003).

Government representation at the hearing. We agree with Commissioner Astrue's testimony at the hearing and do not support proposals to have SSA represented at the ALJ hearing. SSA tested, and abandoned, a pilot project in the 1980s to have the agency represented - the Government Representation Project (GRP). First proposed by SSA in 1980, the plan encountered a hostile reception at public hearings and from Members of Congress and was withdrawn. The plan was revived in 1982 with no public hearings and was instituted as a one-year "experiment" at five hearing sites. The one-year experiment was terminated more than four years later following congressional criticism and judicial intervention.[7]

Based on the stated goals of the experiment, i.e., assisting in better decision-making and reducing delays, it was a failure. Congress found that: (1) processing times were lengthened; (2) the quality of decision-making did not improve; (3) cases were not better prepared; and (4) the government representatives generally acted in adversarial roles. In the end, the GRP experiment did nothing to enhance the integrity of the administrative process.

The GRP caused extensive delays in a system that was overburdened, even then, and injected an inappropriate level of formality, technicality, and adversarial process into a system meant to be informal and nonadversarial.

The longstanding view of the courts, Congress, and the agency is that the Social Security claims process is informal and nonadversarial, with SSA's underlying role to be one of determining disability and paying benefits. Proponents of representing the agency believe that SSA is not being fairly represented in the determination process. It is important to note that SSA and the claimant are not parties on opposite sides of a legal dispute. SSA already plays a considerable role in setting the criteria and procedures for determining disability by establishing regulations, Rulings, and other policy guidance; by providing more detailed internal guidance for SSA and DDS workers; and by hiring ALJs. To establish disability, the claimant must follow the rules set by SSA.

In addition to radically changing the nature of the process, the financial costs of representing the agency at the hearing level would be very high. In 1986, SSA testified in Congress that the cost was $1 million per year for only five hearings offices in the Project (there currently are more than 140 offices).

CONCLUSION

The role of ALJs in the Social Security and SSI disability determination process has been critical to people with disabilities by ensuring their right to a full and fair hearing before an impartial and independent adjudicator. In addition, on behalf of people with disabilities, it is critical that SSA be given adequate funding to make disability decisions in a timely manner and to carry out its other mandated workloads. We appreciate your continued oversight of the administration of the Social Security programs and the manner in which those programs meet the needs of people with disabilities.

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[7] In *Sallings v. Bowen*, 641 F. Supp. 1046 (W.D.Va. 1986), the federal district court held that the Project was unconstitutional and violated the Social Security Act. In July 1986, it issued an injunction prohibiting SSA from holding further proceedings under the Project.

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