

**The National Council of Social Security Management Associations, Inc.**  
**GREYSTONE GROUP WASHINGTON REPORT**  
**Legislative Report 9-2012**  
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**Overview**

On Wednesday, June 27, 2012, the U.S. House Committee on Ways and Means Subcommittee on Social Security held the fourth hearing in the series titled, "Securing the Future of the Disability Insurance Program." The hearing focused on the Social Security appeals process including its history, legal requirements, and the degree to which the current process provides fair, accurate, and consistent outcomes while balancing the needs of claimants and taxpayers.

Five witnesses were asked to testify on two panels. The written testimony of each of the witnesses can be found by clicking on the respective links below:

**Panel 1**

The Honorable Michael J. Astrue  
Commissioner, Social Security Administration

[Testimony](#)

**Panel 2**

Ethel Zelenske  
Director of Government Affairs, National Organization of Social Security Claimants' Representatives, on behalf of the Consortium for Citizens with Disabilities Social Security Task Force

[Testimony](#)

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

[Testimony](#)

Jeffrey Lubbers  
Professor, American University Washington College of Law

[Testimony](#)

Richard J. Pierce, Jr.  
Professor, The George Washington University Law School

[Testimony](#)

**The following Members of Congress attended the hearing:**

**Chairman Sam Johnson (R-3<sup>rd</sup>-TX)**

Representative Kevin Brady (R-8<sup>th</sup>-TX)

Representative Rick Berg (R-At Large-ND)

Representative Adrian Smith (R-3<sup>rd</sup>-NE)

Representative Kenny Marchant (R-24<sup>th</sup>-TX)

**Ranking Member Xavier Becerra (D-31<sup>st</sup>-CA)**

Representative Lloyd Doggett (D-25<sup>th</sup>-TX)

### **Hearing Background Provided by the Subcommittee**

Applications for disability benefits have reached historic levels as a result of more women in the workforce, the recession and slow recovery, and baby boomers reaching their disability-prone years. The 2012 Annual Report of the Board of Trustees projects that the Disability Insurance (DI) program will be unable to pay full benefits beginning in 2016.

In Fiscal Year (FY) 2011, the examiners at the State Disability Determination Services (DDS) made an initial determination on almost 3.3 million disability claims. According to the Social Security Administration's (SSA) longitudinal data, 79 percent of all disability benefit awards are made at the DDS.

Claims that are not approved by the DDS, whether at the initial or reconsideration level, can be appealed to the hearing level, where the claimant has the opportunity for a face-to-face hearing before an Administrative Law Judge (ALJ). In FY 2011, 662,765 hearing requests were completed with 58 percent of requests awarded, 29 percent denied, and 13 percent dismissed. The average waiting time for an ALJ decision is 354 days. Today, 77 percent of ALJs are meeting the agency's annual productivity expectation of 500-700 cases. Currently, individual ALJ award rates vary from 1 to 99 percent.

Individuals whose claims are denied by an ALJ may appeal to the SSA's Appeals Council (AC), which is the final step in the administrative process. In addition, the AC may on its own motion review an ALJ decision. In FY 2011, the AC made 103,681 decisions, awarding benefits in 2 percent of its cases, denying benefits in 74 percent, and remanding 21 percent back to the ALJ level. Individuals who are denied at the AC may pursue an appeal through the federal district court, the federal court of appeals, and the U.S. Supreme Court. In FY 2011, the federal courts decided 13,271 cases, awarding benefits in 3 percent of cases, denying benefits in 42 percent, and remanding back to SSA 46 percent of cases. Of those remanded cases, 67 percent were subsequently allowed by an ALJ.

Further, over the years, the federal circuit courts have issued decisions that conflict with SSA's interpretation of the Social Security Act (Act). In response, SSA appealed those decisions or implemented the circuit court's decision through an acquiescence ruling. While such rulings allow cases to be treated similarly within the circuit, the result is that claimants may be treated differently in different circuits. There are currently 42 acquiescence rulings in effect.

Under the Act, the ALJ decides on behalf of the Commissioner whether benefits are due, and is required to apply SSA's regulations and policies; under the Administrative Procedure Act (APA). The ALJ is an independent decision-maker whose work product cannot be questioned. This tension between the Act and the APA makes program oversight and quality review of outcomes difficult for SSA to assess and manage.

In announcing the hearing, Social Security Subcommittee Chairman Sam Johnson (R-3<sup>rd</sup>-TX) said, **"Those sidelined from working because of a disability must be able to count on a fair and timely hearing by a Social Security judge. Americans need to know that the same rules apply to everyone. This hearing will tell us whether the appeals process we have today works and if not, what changes ought to be made."**

## **Opening Statements**

The opening statements of Chairman Johnson and Ranking Member Becerra can be accessed by clicking on the respective links below:

### **Subcommittee on Social Security Chairman Sam Johnson (R-3<sup>rd</sup>-TX)**

<http://waysandmeans.house.gov/News/DocumentSingle.aspx?DocumentID=301193>

### **Subcommittee on Social Security Ranking Member Xavier Becerra (D-31<sup>st</sup>-CA)**

[http://becerra.house.gov/index.php?option=com\\_content&view=article&id=944:social-security-subcommittee-hearing-on-social-security-disability-program&catid=15:becerra-blog&Itemid=56](http://becerra.house.gov/index.php?option=com_content&view=article&id=944:social-security-subcommittee-hearing-on-social-security-disability-program&catid=15:becerra-blog&Itemid=56)

## **Panel 1 Opening Statement**

Following opening statements from Chairman Johnson (R-3<sup>rd</sup>-TX) and Ranking Member Becerra (D-31<sup>st</sup>-CA), Commissioner Astrue presented his oral remarks. Commissioner Astrue began by noting that when he first came on board as Commissioner there were some 63,000 plus people that were waiting in excess of 1,000 days for a disability hearing. To try and get a better handle on this workload at the time, SSA made hundreds of incremental changes, stated the Commissioner. The plan SSA adopted worked, as the average processing time came down from 532 days in August of 2008, to 340 days in October of 2011.

In 2007, filing rates had been stable for some time, noted Commissioner Astrue. This changed as the recession hit.

SSA also worked to make average processing times more uniform throughout the country. One of the worst offices in the country was Atlanta North where the average processing time was 900 days; it has since dropped to 351 days. Oak Park, Michigan is another example of improvement as the processing time dropped from 764 days to 254 days, stated Commissioner Astrue. Currently, no office in the country has an average processing time greater than 475 days, and 15 offices have hit SSA's ultimate goal of 270 days or less.

Additionally, these numbers are even more impressive as SSA has given priority to the oldest cases which tend to be very complex and time-consuming, stated Commissioner Astrue. Five years ago, SSA defined an aged case as one that had been waiting over 1,000 days for a decision. Today, through the steady work of SSA's employees, the agency now defines an aged case as one taking over 750 days, stated the Commissioner. Next fiscal year SSA plans to further raise the bar by completing all cases over 675 days.

People currently wait 208 days for a hearing, but SSA is hopeful the figure will be further reduced next year, stated Commissioner Astrue. By contrast, the average wait at the beginning of Fiscal Year (FY) 2007 was 340 days.

But, despite SSA employees' hard work, the progress in addressing the hearings backlog is happening more slowly than the agency would like, noted Commissioner Astrue. If SSA is not adequately funded the agency will not be able to hire enough Administrative Law Judges and support staff to handle the

workload, and the recent progress that has been made will erode. SSA has already had to scrap some plans such as the opening of eight new hearing offices, stated Commissioner Astrue. SSA needs Congress to enact the President's FY 2013 Budget so that the agency can meet the public's expectations, noted Commissioner Astrue.

**Panel 1 Question and Answer**

Following Commissioner Astrue's oral statement, the question and answer session began. The following details a few key exchanges during this session.

Chairman Johnson (R-3<sup>rd</sup>-TX) asked the Commissioner if ALJs are really needed to do the work. Commissioner Astrue stated that the general authorizing language for conducting hearings does not specify the use of ALJs, but that in the statutes it does appear that Congress now assumes that ALJs are part of the process.

Ranking Member Becerra (D-31<sup>st</sup>-CA) stated that because Congress has shortchanged SSA, in that the agency has received far less (funding) than it requested the previous two years, there continue to be issues with wait times. Commissioner Astrue responded that SSA is different than most other agencies and because of demographics and other various reasons workloads can fluctuate dramatically. SSA is taking in a million additional claims each year, between disability and retirement. This is more than was projected, and has mainly been driven by the recession, noted the Commissioner. If the recession were not so deep and long, SSA could possibly have met the goal of 270 days by now, added Commissioner Astrue.

Representative Kenny Marchant (R-24<sup>th</sup>-TX) asked the Commissioner what more can be done to resolve disability claims at the state level. Commissioner Astrue responded that most of the administrative expense is due to staff chasing down stray medical records; many times SSA doesn't even know for sure that the agency has them all, stated the Commissioner. When individuals start to move more towards electronic medical records, it will reduce this expense. SSA has initiated a partnership with Kaiser Permanente to move in the direction of electronic medical records, added the Commissioner. SSA should start to see some of the results of this partnership in about three to five years.

Representative Marchant also asked if there is any merit to closing the medical records at some point so someone can actually make a decision without always having additional material coming in. Commissioner Astrue responded that SSA believes so, and that in New England, SSA has been closing the record, for the ALJ, five days before the hearing. This has been something the agency has received pushback from this Subcommittee on, noted the Commissioner.

Representative Marchant next inquired about the rise in disability claims, and if states are trying to shift people from unemployment into disability, and ultimately into Medicaid and Medicare. SSA believes so to some extent, responded Commissioner Astrue, but it is very difficult to gather evidence of it. SSA believes the reason is mainly because of state budgets, although the agency really does not know how big a factor this is, noted Commissioner Astrue. But it is an abuse that does exist, added the Commissioner.

Representative Brady (R-8<sup>th</sup>-TX) asked what is needed to better fight fraud within the disability system. Commissioner Astrue responded that the single most important thing is to be able to conduct timely medical reviews of beneficiaries, as there is an enormous payback when SSA is able to do a disability review. This past year SSA had to reverse course, because both the Senate and House Appropriations Committees originally allotted 582,000 reviews, then at the last minute there was a change and the final bill passed with only 435,000 reviews allocated. This reduction caused SSA to not be able to attain a level that the agency felt was appropriate, as well as forced the agency to reallocate a number of resources, stated Commissioner Astrue. This really does come down to whether SSA receives the resources necessary to be able to address these reviews.

Representative Lloyd Doggett (D-25<sup>th</sup>-TX) asked Commissioner Astrue if it is true that at the current time SSA does not have the resources to replace workers that leave the agency. Commissioner Astrue responded that as a general matter, that is correct. SSA has a hiring freeze in place with very limited exemptions for backlog reduction. In addition, SSA has about 1,000 employees, which the agency is waiting to see what to do with, based on sequestration. SSA has reached the one percent statutory limit as it relates to reemployed annuitants, and to the extent that the agency has done any hiring in the past six months it has been temporary employees, stated the Commissioner. Thus, if SSA has to let staff go, because of sequestration, the agency will let the temporary employees go first so that SSA does not have to cut staff who have been around for 20 or 30 years.

Representative Doggett inquired next as to the backlog reduction numbers and if it is true that recently those numbers are trending in the wrong direction. Commissioner Astrue responded that was correct, slightly, but statistically, it is almost level. Representative Doggett asked how likely is it that SSA will meet its goal of 270 days, if the agency's budget is not fully funded. Commissioner Astrue stated that it is very unlikely SSA will meet the 270 day goal mainly because of funding, receiving judges from the Office of Personnel Management (OPM), and the recession.

## **Panel 2 Opening Statements**

Following Commissioner Astrue, the members of Panel 2 presented their opening statements. The first to present was Ethel Zelenske, Director of Government Affairs, National Organization of Social Security Claimants' Representatives, on behalf of the Consortium for Citizens with Disabilities Social Security Task Force. Ms. Zelenske began by noting that while the wait for a disability hearing is still too long, processing times have been significantly reduced over the past few years. We support the Commissioner's goal of reaching 270 days by the end of next year, added Ms. Zelenske. However, there are deep concerns that any progress will be stymied because of the lack of resources for SSA. Ms. Zelenske urged support for the President's FY 2013 Budget Request for SSA, which would allow the agency to move forward and address many of its current concerns.

Next to present an opening statement was the Honorable D. Randall Frye, President, Association of Administrative Law Judges. Mr. Frye began by stating goals are very important for everyone, but what the Administrative Law Judges have been faced with are not goals, they are quotas, and quotas are destructive. Under the current system, judges are responsible for wearing three hats. First, they must represent the government; second, the rights of the claimants; and third, judges must fairly apply the

law. This is a very tough burden, stated Mr. Frye. Given how swamped, how difficult, and complex cases are, quotas make things even more difficult, noted Mr. Frye.

Jeffrey Lubbers, Professor, American University Washington College of Law, presented his statement next, and noted the growth of SSA's disability adjudication has been unbelievable. In 1973, the number of cases that reached the hearing level jumped to around 56,000, stated Mr. Lubbers. Today, the caseload for 2012 will be around 832,000, dwarfing the 1973 figure. As a consequence the per-judge disposition rate has jumped dramatically. In closing, Lubbers noted the overall size and kind of cases the Social Security Disability program is currently facing means that the program really does need some special considerations to be able to address the current workload.

Finally, Richard J. Pierce, Jr., Professor, The George Washington University Law School, testified. He began by noting there are a couple of major problems with the Social Security Disability program. First, it is increasingly unsustainably generous, given that the proportion of the population that is now determined as disabled has doubled and the cost of the program has quadrupled. The other problem is the massive variations in the ALJ acceptance rates. This has been a problem for some 35 years, noted Mr. Pierce. He emphasized that if the problem is not addressed then we will be having this same exact discussion 35 years from now as well.

### **Panel 2 Question and Answer**

Following the second panel's opening statements, the question and answer portion began. The following details a few key exchanges during this session.

Chairman Johnson began by asking Mr. Frye if judges should have any expectations placed upon them regarding the number of cases they handle, while the whole time individuals wait in very long lines to get a hearing. Mr. Frye noted that he strongly believes in goals, but the better standard is to set a wider range. Setting quotas often means that time constraints are placed on judges no matter how complex or difficult a case may be. Additionally, most individuals do not do well with quotas, noted Mr. Frye.

Representative Marchant asked what the average age of a case is once an ALJ sits down and begins to focus on it. Judge Frye responded that his understanding is that the average age of a case, from when it was filed, is around 2 years, but this obviously varies depending on staffing levels. The fact is that by the time the case gets to the ALJ level, as opposed to the state agency level, it tends to be much more developed, as there is generally more information available.

Chairman Johnson asked Mr. Pierce how SSA should balance judicial independence and making sure there are consistent outcomes and productivity. Mr. Pierce responded that SSA should certainly not try to influence the outcome of any individual case, but it is pretty easy to do what most law schools do, which is expect that law school professors issue grades within a certain range. Mr. Pierce added it really is not hard to conform to those norms. Mr. Pierce also noted that due process would be well served by setting a range of certain acceptance rates.

Ranking Member Becerra made a statement during the question and answer portion, in which he highlighted some statistics related to SSA's FY 2011 disability workloads. Representative Becerra stated there were 3,295,806 disability decisions issued at the initial stage by the Social Security Administration in FY 2011. Of those decisions, 34 percent were to award benefits, and 66 percent were to disallow benefits. Of those 66 percent that were denied, a portion appeal. In FY 2011, SSA received 853,142 appeals to reconsideration, stated Ranking Member Becerra. Of those appeals, SSA issued slightly over 819,710 decisions, of which the agency granted benefits to 12 percent. If denied at the appeals level, the case can be further appealed to an ALJ. At the administrative appeal level, 662,765 cases were decided, of which 58 percent were allowed, 13 percent were dismissed, and 29 percent were denied. The next step of appeal is the Appeals Council, which handled about 103,000 cases in FY 2011, and approved around two percent.

If you are interested in watching the video of the Subcommittee hearing, you can access the archived webcast by clicking on the link below:

[http://waysandmeans.granicus.com/MediaPlayer.php?view\\_id=2&clip\\_id=352](http://waysandmeans.granicus.com/MediaPlayer.php?view_id=2&clip_id=352)

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