



## Committee on Adjudication

Meeting Minutes

March 12, 2013

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### Members Attending

Judge John Vittone (ret.), Committee Chairman

Judge Charles Center

Judge Randall Frye (by telephone)

Judge Edward Kelly (by telephone)

Judge Robert Lesnick

Jeffrey Lubbers

Gillian Metzger (by telephone)

Bryan Polisuk (on behalf of Chairman Susan Tsui Grundmann by telephone)

Glenn Sklar (by telephone)

Judge Thomas Snook (by telephone)

Judge Daniel Solomon

### ACUS Staff Attending

Paul Verkuil, Chairman

Gretchen Jacobs, Research Director

Matthew Weiner, Executive Director

Amber Williams, Staff Counsel

Amanda Abbott, Intern

### Invited Guests Attending

Dean Harold Krent, Consultant, ACUS Social Security Disability Adjudication Project

Professor Scott Morris, Consultant, ACUS Social Security Disability Adjudication Project

Rainbow Forbes, Social Security Administration

Patricia Jonas, Social Security Administration

Bill Taylor, Social Security Administration

Ethel Zelenske, National Organization of Social Security Claimants' Representatives

### Members of the Public Attending

Jeanne Morin, Akerman

James Racine, Law Clerk to Judge Daniel Solomon

Cody Smith, Department of Transportation



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The meeting commenced at 1:00 pm in the conference room of the Administrative Conference.

### Meeting Opening

Judge Vittone made opening remarks and took attendance. He then called for approval of the May 7, 2012 minutes. Chairman Verkuil thanked the consultants and expressed his pleasure at the report's progress. Ms. Jacobs noted that there are separate reports for the treating physician rule and the statistical analysis due to the complex nature of the project.

Ms. Williams provided background information on the treating physician rule, which gives controlling weight to the medical opinion of a physician who has an ongoing doctor-patient relationship with a claimant. Ms. Jacobs explained that the report is based on, among other things, empirical data, as well as comments from the National Organization of Social Security Claimants' Representatives (NOSSCR) and the National Association of Disability Representatives (NADR). The empirical results show that the treating physician rule is the second most frequently cited reason cases are remanded from the Appeals Council back to Administrative Law Judges (ALJs), and the most cited reason for remand in the federal courts. The results also indicate that the use of a medical examiner did not affect the disposition rate. In addition, the report details why the changing nature of healthcare has eroded the need for the treating physician rule. Specifically, individuals now visit multiple medical professionals in a variety of settings and, thus, no longer tend to have long-term relationships with a single physician.

Ms. Jacobs thanked Mr. Krent and Mr. Morris for their work on the project. Mr. Krent pointed out that rates with which ALJs grant claimants' requests for disability benefits vary widely, sometimes even within the same office. Most commenters agree that there should be less deviation among these decisions, and the study thus looked at ways to encourage greater consistency.

Mr. Morris then summarized the empirical results of the study. On average, each ALJ issued 539 dispositions per year, with the number of dispositions ranging from 200 to over 3,600. An average of 56 percent of claims were allowed, but the allowance rates ranged from 4 percent to 98 percent. The average number of dispositions over time has been fairly stable, though the level of variability has slightly decreased. One way to determine why this variability occurred is to look at outliers, which can either be defined as ALJs who fall more than two standard deviations away from the mean for two consecutive years or can be determined based on a predictive model that could be developed based on case characteristics. There was a very small, but statistically significant, correlation between the number of dispositions and the number of allowances/denials among ALJs in the top one percent of dispositions. This correlation, however, did not exist for ALJs with the fewest dispositions. There was no correlation between the use of video hearings and the number of dispositions, though ALJs using video hearings did have a 3 percent lower allowance rate. Finally, allowance rates tended to be higher in title II claims than



title XVI claims, when there was a medical or vocational expert present, and when the claimant had a representative.

Mr. Krent briefly explained the rationale behind the recommendations. They included: (1) requiring a claimant's representative to submit a pre-hearing brief that would prevent ALJs from having to spend time gathering information and allow them to devote more time evaluating the merits of each case; (2) having ALJs serve on the Appeals Council would allow them to sharpen their skills by observing their peers, as well as give them a greater understanding of and respect for the Appeals Council; (3) assigning a specific decisionwriter to an ALJ would help improve communication between the two and foster a sense of pride in the decisionwriter's work; (4) offering video hearings provide flexibility and a potential for cost savings. Mr. Krent also pointed out that there is no government representative in disability hearings and emphasized the need for accuracy and consistency in those hearings that could be accomplished through increased use of the Appeals Council.

Judge Vittone then opened the floor for discussion, asking that the Committee work its way through each recommendation sequentially. He noted, however, that as the Committee's goal is to engage in a thorough, complete dialogue, the recommendations would likely warrant further discussion at the next meeting. Mr. Lubbers praised the report as being well-drafted, but expressed his view that the title is narrower than the overall goal of the project. Hearing no more objections, Judge Vittone proceeded to discuss the draft recommendations.

### **Discussion of Part A: ALJ Hearing Stage of the Draft Recommendation**

The Committee proceeded to discuss Part A of the Draft Recommendation.

#### *Discussion of Recommendation 1(a)*

Judge Solomon noted that, in the past, ALJs have had staff members to supply them with medical information, and in some areas of the country they may still do this. Judge Lesnick expressed concern that to only ask one side for a brief would be unfair, or at least give the appearance of unfairness. Mr. Krent pointed out that nothing prevents a claimant from filing a brief under the current system, and that requiring such briefs would aid the judge in determining what areas of a case need clarification. Judge Lesnick expressed his support for participation by government representatives, as well as his desire that the Committee study the use of lawyers in SSA proceedings. Mr. Krent agreed, but noted that in the absence of funding for such representatives, this recommendation would be a step in the right direction. Mr. Lubbers noted concerns about the use of government representatives that he had observed as part of a previous project with Chairman Verkuil and Mr. Frank Bloch. He expressed concern that the hearings would become more adversarial and the potential that they might be subject to EAJA fees. He noted that this idea should not be rejected summarily, but only used in certain cases, such as where there is a potential for fraud. Regardless, he reminded the Committee that government



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representation is outside the scope of this project and that recommendation 1(a) is a positive step. Ms. Zelenske reiterated that representatives can already submit briefs. She noted, however, that practitioners must first assess how receptive a given ALJ will be to receiving such a brief when deciding whether to submit one. Judge Vittone then stated that he was not going to ask for a vote on each recommendation as the Committee discussed them. As the Committee's overall opinion of 1(a) seemed to be positive, he proceeded to recommendation 1(b).

### *Discussion of Recommendation 1(b)*

Mr. Lubbers expressed surprise at the correlation between video hearings and productivity and asked if there was any indication as to the reason for this correlation. Mr. Krent and Mr. Morris said that there was none. Judge Lesnick expressed the view that video hearings are useful and cost-effective. He, however, objected to giving claimants incentives for agreeing to the use of a video hearing, particularly in light of the fact that video hearings are typically used at request of claimants, not ALJs. Judge Solomon noted a high level of support for video hearings among judicial staff and thought that they will likely see a resurgence in light of sequestration. However, he believes that it is unclear whether such hearings will actually prove cost-effective due to issues like potentially having to reimburse witnesses for expenses incurred in travelling to the nearest video conferencing site. Judge Vittone agreed with Judge Lesnick's observation about video conferencing being a convenience to the claimant and witnesses. Judge Center pointed out that video conferencing does not actually shorten the length of hearings. The only efficiency associated with such hearings is that the judge no longer has to travel between hearings. Because judges usually group hearings by geographic proximity, however, he does not believe video hearings have much effect. Mr. Sklar, on the other hand, said that SSA has seen millions of dollars in savings from the use of video hearings. Judge Lesnick renewed his objection to the use of incentives and suggested removing the second sentence of 1(b). Mr. Lubbers stated that he understood not wanting to exert pressure with the second sentence, but suggested that it is a drafting matter, which Judge Solomon suggested leaving to ACUS staff to fix. Chairman Verkuil noted that the incentives listed in 1(b) are already offered, but agreed not to refer to them as "incentives." Judge Lesnick suggested that claimants be informed of benefits. Mr. Lubbers suggested that the higher productivity associated with video hearings may be due to claimants who opt for a video hearing not having as strong a case as claimants who opt for a traditional hearing. Mr. Morris reiterated that the statistical results can only show correlation, not causation, and as such, self-selection may be a factor. In response to a question by Chairman Verkuil, Mr. Krent and Mr. Morris noted that they found no correlation between representation and productivity, which they found surprising. Judge Vittone suggested that the language in the second sentence be revised to "advise" or "inform."

### *Discussion of Recommendation 1(c)*

Judge Lesnick expressed concern with recommendation 1(c). He believes that given the inevitability that some decisionwriters will be better than others, judges will be upset if they are



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assigned the worst one. Judge Solomon observed that some agencies have units in competition with each other for performance awards, overtime, etc., and they have higher levels of productivity.

Mr. Lubbers asked whether the parenthetical information in 1(c) is designed to avoid making ALJs supervisors. Mr. Krent explained that it was an attempt to vest ALJs with some authority, but not power to fire or discipline, which would implicate union concerns. He also noted that most judges and decisionwriters are in favor of this recommendation. Judge Center pointed out that SSA judges cannot engage in supervisory activities if they want to be eligible to engage in collective bargaining. Ms. Jonas observed that better communication seems to be at the heart of this issue. Judge Vittone noted that the Committee reached general agreement.

### **Discussion of Part B: Appeals Council of the Draft Recommendation**

The Committee proceeded to discuss Part B of the Draft Recommendation.

#### *Discussion of Recommendation 2*

Judge Solomon expressed concern that publishing decisions might pressure ALJs to rule a certain way, because the public will be privy to the decision. He also noted that the substantial evidence test has been a challenge at the Appeals Council for years. Mr. Lubbers suggested that regardless of what happens with the recommendation, it should at least acknowledge Recommendation 87-7. Judge Solomon recommended adding language to require decisions to be published, but Mr. Krent noted that this language would be more appropriate in Recommendation 3.

#### *Discussion of Recommendation 3(a)*

Mr. Lubbers questioned the degree to which the recommendation should emphasize the error-correcting function of the Appeals Council. He suggested using the phrase “key function” instead of “primary function.” Hearing no objections to recommendation 3(a), Judge Vittone proceeded to the discussion of Recommendation 3(b).

#### *Discussion of Recommendation 3(b)*

Judge Vittone recommended adding the phrase “to the greatest extent feasible.” Judge Center noted that if there is an outlier ALJ, this recommendation will only add time to the appeals process. Mr. Lubbers inquired whether a representative can request that a case be reassigned to a different judge. Ms. Jonas answered that, with the exception of those handled by the National Hearing Center, remanded cases go back to the judge who originally decided them, unless there is evidence of bias. Judge Vittone remarked that some cases are remanded from federal courts, in which case the error may have been made by the Appeals Council rather the



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ALJ. Mr. Lubbers questioned whether cases that are repeatedly remanded should continue going back to the same judge.

### *Discussion of Recommendation 3(c)*

Judge Vittone expressed approval for allowing ALJs to have input on the Appeals Council. Mr. Lubbers suggested adding that the Office of Personnel Management should give favorable consideration to the waiver mentioned in the recommendation. Judge Lesnick expressed his belief that the recommendation would be beneficial, but wanted to ensure that it would not become mandatory. Mr. Krent noted that the report did not delve into that issue, but he assumed it would be voluntary. Judge Vittone asked if there was any objection to adding the phrase “extended voluntary,” and there was none.

Judge Solomon noted that while ALJ decisions appeared in a West reporter in the past, they are no longer published. Ms. Jonas indicated that there are ALJ opinions, but they are not published. Mr. Lubbers asked whether these opinions are available under the Freedom of Information Act, but Ms. Jonas did not know. Mr. Sklar pointed out that the issue with publication is that the opinions would have to be heavily redacted. Mr. Lubbers asked whether the opinions are given to the parties, and Mr. Sklar acknowledged that they are. Judge Solomon then pointed out that the opinions are also given to the NOSSCR, and that the opinions were published unofficially in the 1980’s with the permission of the claimants. Judge Vittone noted that the publications to which Judge Solomon was referring were private, but that the Committee was discussing having the government publish them.

Mr. Krent expressed concern over the volume of decisions. Ms. Jonas said that there were 166,000 decisions last year, though there were not opinions in every case. Judge Vittone questioned the number of Appeals Council Interpretations (ACIs). Ms. Forbes said she did not know the exact number, but that there are probably only a couple per year. Judge Solomon noted that only publishing cases identified for their precedential value would drastically reduce the number of cases that would need to be published. Mr. Lubbers agreed, noting that publishing precedential cases would be a good middle ground between publishing every decision and only those that rise to the level of an ACI. Mr. Sklar questioned how this would fit into the rulemaking structure.

### *Discussion of Recommendation 4*

Judge Lesnick voiced strong concerns about this recommendation, stating own motion review should be used for all decisions or none. He emphasized that just because an ALJ is termed an outlier, he or she is not necessarily wrong or a bad judge. Mr. Lubbers noted that only 40 out of 1,500 judges were considered outliers, and that the recommendation’s suggestion that reviewal of their decisions should not be a basis for discipline. Judge Lesnick inquired as to the basis for determining whether a case has been correctly decided, and pointed out that SSA has a





history of sending judges identified as outliers to new judge training, which is an adverse action. Chairman Verkuil then asked the consultants to offer a more fulsome explanation of the recommendation, and Mr. Krent emphasized that identifying a judge as an outlier was not a suggestion that the judge's decisions are wrong, but simply a cause to take a closer look at those decisions as a safeguard. Judge Solomon noted that the same judges would be targeted for review over and over again. Judge Lesnick reiterated the importance of fairness and stated his belief that it is impossible to be neutral when choosing certain judges' cases to review. He suggested that adversarial hearings would be useful in this regard, and carry the potential for savings. Ms. Jonas stated that currently a random sample of cases on motion for review are examined, and that repetitive problems identified through that examination are addressed through training. However, she expressed a desire for more feedback for ALJs, since they primarily only receive feedback on an individual case via a remand order and the Appeals Council only remands a minority of cases that even reach it. Judge Solomon noted that before cases even get to the Appeals Council, they go through state proceedings, and there is no way to standardize the payouts among states. Mr. Morris noted that the expected results could be adjusted to change the determination of which judges are considered outliers. Judge Lesnick stated that it would be better if samples of every judge's decisions are reviewed, because only looking at outliers could threaten judicial independence. Judge Vittone suggested, and Chairman Verkuil agreed, that this portion of the discussion be resumed at the next meeting in order to allow enough time to thoroughly discuss the treating physician rule.

### **Discussion of Part C: Use of Opinion Evidence from Medical Professionals (Treating Source Rule) of the Draft Recommendation**

The Committee proceeded to discuss Part C of the Draft Recommendation.

#### *Discussion of Recommendation 5*

Mr. Lubbers began by praising the report, and stating his agreement with the recommendation. He did, however, raise some optics issues. He believes that the problem is not that treating physicians should not be afforded weight, but just that the way they are being assessed now is not working. As such, he favors adding nurse practitioners, physician assistants, and social workers as treating sources because they are part of the new reality of healthcare. Judge Lesnick proposed replacing "controlling weight" in the first sentence with "presumptive weight." Mr. Lubbers expressed satisfaction with the factors listed in the recommendation, but noted that it should be so clear that a doctor was a treating physician in some cases, such as when a claimant has seen the same primary care doctor for a number of years, that the factors should not even need to be considered. Ms. Jacobs questioned what should be done when there are several treating physicians, as there often are. Mr. Lubbers suggested that SSA should come up with a better definition of "treating physician," but Mr. Taylor noted that this would be very difficult, because there is never going to be a complete consensus that the definition is correct. Judge Vittone also pointed out that because the medical field changes so quickly, by the time SSA can formulate a definition, it would probably need to be changed again. Ms. Zelenske



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suggested that the problem usually is not whether enough weight was given to the treating physician, but rather that the ALJ did not adequately explain what he did and why. As such, she believes the recommendation's factors are adequate to define who is a treating physician, but something still needs to be done so that ALJs will better explain their rationales. Mr. Lubbers then took issue with the first line of the recommendation, as he felt that it appears to criticize giving treating physicians more weight. Judge Vittone suggested removing the first sentence, and no one objected.

### *Discussion of Recommendation 6*

Mr. Lubbers began by questioning whether there are other groups that should be included as “acceptable medical sources” that are not already listed in the recommendation. Ms. Jacobs noted that the report did not look at other groups because NOSSCR and NADR, as well as the relevant literature, suggested that these are the groups providing the bulk of primary care services. Mr. Lubbers then asked if adding “such as” before the list of these providers would be too open-ended. Ms. Jacobs responded that if that were done, a qualifier would need to be added to make clear that the recommendation only refers to licensed medical professionals. Chairman Verkuil reiterated the fact that these categories had already been vetted.

### **Discussion of Part D: Statistical Quality Assurance Measures of the Draft Recommendation**

#### *Discussion of Recommendation 7*

Mr. Lubbers began the discussion by noting that the names of the data reporting systems come and go. Ms. Jacobs pointed out that the recommendation intended to address this by indicating that it applies to any respective follow-up systems. Ms. Jonas noted that the reporting systems included in the recommendation are a good representation of the current systems, though they are subject to change. Judge Vittone suggested substituting “such as” for “including” before the list of systems.

#### *Discussion of Recommendation 8*

Mr. Lubbers remarked that data reporting systems come and go. Ms. Jacobs recommended including “or any respective follow-on systems.” Mr. Lubbers then suggested including an explanation of the differences between the Case Processing Management System and the Appeals Council Review Processing System in the preamble. He then asked whether there is any relationship between this recommendation and recommendation 4(c). Ms. Jacobs responded that there is a relationship only in the sense that recommendation 8 may help identify the cases for the type of review discussed in recommendation 4(c), but that there is no indication whether or not it will actually help in this regard. Mr. Lubbers expressed his view that this recommendation does not flow naturally from the others. Mr. Morris noted that if targeted reviews are conducted, there needs to be quality data supporting them. Chairman Verkuil suggested that the inclusion of a cross-reference to might be useful. Hearing no objection, Judge Vittone proceeded to discuss Recommendation 9.





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### *Discussion of Recommendation 9*

Judge Vittone noted that there seemed to be general agreement on this recommendation. Judge Solomon then questioned why a person without an identifiable impairment should even get a hearing, and pointed out that SSA could save considerable money by doing vocational training and rehabilitation at the outset, because there would no case to appeal. Mr. Krent noted that many economists agree with Judge Solomon's assessment. Mr. Lubbers suggested, and Judge Vittone and Chairman Verkuil agreed, that this discussion is beyond the scope of this report and that it is worthy of future study.

### **Meeting Closing**

The Committee agreed to continue its discussion of the recommendation at its next meeting on April 8, 2013. Judge Vittone then concluded the meeting shortly before 4:00 p.m.