Recommendation 90-4

Social Security Disability Program Appeals Process: Supplementary Recommendation

(Adopted June 8, 1990)

The Administrative Conference of the United States has undertaken numerous studies over the years relating to the appeals process in the Social Security Administration (SSA) disability program. It has issued four recommendations specifically involving the various levels of review in that program. It has also issued other more general recommendations involving various aspects of adjudicatory procedure. This Recommendation is intended to supplement those previous recommendations to reflect the passage of time and experience. It is consistent with previous recommendations, but in some cases, it goes further, or makes suggestions in areas previously left unaddressed. Unless specifically noted, existing recommendations have not been superseded, and their provisions will not be repeated in this Recommendation.

The SSA disability appeals process involves several steps. The initial determination of disability is made by federally funded state Disability Determination Services (DDS). A dissatisfied claimant may seek reconsideration by a different individual in the DDS. This reconsideration decision is appealable to an administrative law judge (ALJ) in SSA's Office of Hearings and Appeals, who holds a hearing on issues on appeal. If the claimant continues to be dissatisfied, he or she may appeal to the Appeals Council, which reviews the case and may in some instances permit supplementation of the record. Judicial review in the United States district court is available from an Appeals Council decision, which is considered to be final agency action.

Prior Recommendations

In 1978, ACUS issued Recommendation 78-2, *Procedures for Determining Social Security Disability Claims, 1 CFR 305.78-2,* which primarily addressed the administrative law judge stage of the Social Security disability program. It recommended the continued use of ALJs, and made suggestions concerning the development of the evidentiary hearing record, including recommending ALJs take more care in questioning claimants, seek to collect as much evidence prior to the hearing as possible, make greater use of prehearing interviews, and make better use of treating physicians as sources of information.

In 1987, ACUS issued two recommendations relating to the disability program. Recommendation 87-6, *State-Level Determinations in Social Security Disability Cases*, 1 CFR 305.87-6, addressed the first level of determination and review in the disability program. Recommendation 87-7, *A New Role for the Social Security Appeals Council*, 1 CFR 305.87-7, addressed the organization and function of the Appeals Council. Recommendation 87-6 was based on early results from demonstration projects involving the state-level disability determination process. It recommended additional experimentation with face-to-face procedures. Recommendation 87-7 suggested wide-ranging and substantial changes in the workings of the Appeals Council, including that it move away from its historical primary function as a case review panel. The recommendation suggested that the caseload be significantly limited, and that the Appeals Council focus on important issues on which it could issue precedential opinions.

In 1989, ACUS issued two further recommendations affecting the disability program. Recommendation 89-10, *Improved Use of Medical Personnel in Social Security Disability Determinations*, addresses a variety of issues involving medical decision making at the state-level determination stage. It proposes enhancement of the role of medical decision makers, increased effort to develop medical evidence in the record, and improved training of medical staff on legal and program issues. It recommends use of optional face-to-face interviews and elimination of the reconsideration step. It also recommends that claimants be informed of deficiencies in the medical evidence prior to the issuance of a state-level determination, and that the opinion of a claimant's treating physician be given the weight required by court decisions and SSA rules. In addition, Recommendation 89-8, *Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions*, recommends agencies index and make publicly available adjudicatory decisions of their highest level tribunals, and further suggests that agencies not treating decisions as precedential reexamine those policies. This general recommendation would apply to the SSA Appeals Council.

Supplementary Recommendation

In 1989, the Social Security Administration asked the Administrative Conference to prepare a report that would describe the SSA disability process, review the relevant statutes, compare the process with disability programs under other statutes, and synthesize the relevant ACUS recommendations. The following supplementary recommendations are suggested by this

report. These recommendations are consistent with the spirit, and in most cases, also with the letter of previous recommendations described earlier, but they address issues that have heretofore not been addressed by the Conference or have been addressed in a manner for which additional refinement is appropriate.

Decisions on social security claims that are issued at each level of the process need to contain information sufficient to allow the claimant to make an informed decision whether to appeal to a higher level. It is therefore important that the basis for the decision, including the facts found, be stated clearly. Further, where the record appears not to be complete, the decision should indicate what information is lacking, so that it can be provided at the subsequent level. These suggestions apply both to the initial decision at the state level and to the ALJ decision. The Conference recognizes that SSA rules already require most of this information in ALJ decisions, but more consistent implementation of these rules is needed.

The Social Security Act provides claimants the right to subpoena witnesses and information. Moreover, the Supreme Court made clear in *Richardson v. Perales*, 402 U.S. 389 (1971), that the availability of subpoenas may be critical to a claimant's ability to present relevant evidence. However, subpoenas are seldom issued in disability proceedings. The Conference believes ALJs should be encouraged to issue subpoenas, and claimants should be encouraged to seek them to complete the record. While the Conference recognizes concerns exist about effective enforcement, it believes such concerns should not prevent the issuance of subpoenas, and the enforcement issue should be addressed separately. If enforcement of subpoenas appears to be a problem in the future, the Conference will consider studying the issue separately.

Prehearing conferences at the ALJ level could be used to streamline the hearing process by narrowing issues and ensuring the necessary evidence will be available at the hearing; in some cases the prehearing conference may eliminate the need for a hearing. However, such conferences should not be used to discourage claimants from seeking a hearing. Nor, except in rare cases, should they be used in cases involving *pro se* claimants, who might unknowingly waive rights or later opportunities to present evidence.

The Conference believes it is important that the evidentiary record be as complete as possible as early in the process as possible. It believes the increased use of subpoenas will make this possible, in conjunction with the provision in Recommendation 89-10, ¶5(c), that physicians asked to provide medical information in disability proceedings be adequately compensated. If a claimant is informed by the ALJ what information is still needed after the

hearing, and is given an opportunity to supplement the record at that time, the need to supplement the record after the ALJ hearing should decrease.

The Conference is also recommending that the record before the ALJ be closed at a set time after the hearing. The procedure would give the claimant sufficient time to acquire such information as is needed to complete the record, and would also provide for extensions of time upon a showing of good cause.

As a corollary to this, the Conference is recommending that a procedure be developed for the ALJ to reopen a record upon petition by the claimant where there is new and material evidence relating to the period covered by the hearing. Such petitions could be filed within one year of the ALJ decision or while the case is pending before the Appeals Council if it has been appealed.[1] Under such a procedure, new evidence would be considered first by the ALJ, thereby giving the adjudicator most familiar with the case the first opportunity to review new evidence, potentially reducing the number of cases that would be presented to the Appeals Council, and giving the Appeals Council more of an appellate role. *See generally* Recommendation 87-7. The ALJ's decision not to reopen should be appealable to the Appeals Council. If the Appeals Council finds that new and material evidence did exist, it should generally remand to the ALJ for consideration of the evidence, except where substantial injustice or unreasonable delay would result.

These recommended procedural changes are not designed to limit the record in a disability case, but rather to impose additional structure on the process, by clarifying the rules and encouraging the timely production of evidence. It is expected that these changes will result in evidentiary records being completed in a more timely and efficient manner, thereby increasing the quality of the decisions based on those records.

The issues addressed in paragraph 5 of the recommendation, discussed above, were considered in Recommendations 78-2(C)(1) and 89-7(1)(c)n.2 These previous provisions are subsumed within this Recommendation.

[1] These proposed procedures are distinct from the supplementary to SSA's generic "reopening" procedures set forth at 20 CFR 404.987-404.989; 416.1487-89.

Recommendation

The Social Security Administration (SSA) should make the following changes in the disability determination and appeals process:

1. *Contents of Decisions*: SSA should require that disability benefit decisions, both at the state-level determination stage and at the administrative law judge stage, clearly provide in language comprehensible to claimants at least the following information:

a. The date the application for benefits was filed.

b. The date of onset of disability as alleged by the claimant.

c. The date of onset of disability, if any, that has been determined by SSA.

d. The period of time or category for which benefits have been denied, if any. Where benefits have been awarded for one period or category and denied for another period or category, the notice should clearly state benefits have been partially denied.

e. If any category of benefits has been denied for any period, a list of evidence considered, and an explanation of why benefits were denied, including why the evidence of record did not support the grant of benefits.

f. The date of expiration of claimant's disability insured status (i.e., the "date last insured").

g. The adverse consequences, if any, including preclusive effects, that will result from failure to appeal the decision.

2. *Prehearing Conferences*: The use of prehearing conferences should be encouraged in appropriate cases to frame the issues involved in the ALJ hearing, identify matters not in dispute, and decide appropriate cases favorably without hearings. Except in rare cases, such conferences should be held only where claimants are represented by counsel, and they could be held over the telephone where all parties agreed. A report on the conference, reflecting any actions taken, should be included in the record. Issues that should be considered at a prehearing conference include:

a. Additional information that is required.

b. Subpoenas that may be necessary.

c. Witnesses that may be required.

d. What issues are or are not in dispute.

3. *Subpoenas*: Administrative law judges' use of their subpoena power should be encouraged. Subpoenas should be issued *sua sponte* where necessary to ensure medical evidence is complete, and to obtain other necessary evidence not otherwise available. Subpoenas should be issued when requested by the claimant except where the ALJ finds good cause not to issue a particular subpoena. SSA should develop form subpoenas for use by disability claimants, and provide instructions for their use. This recommendation is to be read in conjunction with Recommendation 89-10, *Improved Use of Medical Personnel in Social Security Disability Determinations*.

4. *Closing of the Administrative Record*: The administrative hearing record should be closed at a set time after the evidentiary hearing. Prior to this, the ALJ should set forth for the claimant what information the claimant needs to produce to complete the record, issue any necessary subpoenas, and provide the claimant adequate time to acquire the information. Requests for extension should be granted for good cause, including difficulty in obtaining material evidence from third parties. The ALJ should retain the discretion to accept and consider pertinent information received after closure of the record and before the decision is issued.

5. *Introduction of New Evidence After the ALJ Decision*:

a. Upon petition filed by a claimant within one year of the ALJ decision or while appeal is pending at the Appeals Council, the ALJ (preferably the one who originally heard the case if he or she is promptly available) should reopen the record and reconsider the decision on a showing of new and material evidence that relates to the period covered by the previous decision. An ALJ's denial of such a petition should be appealable to the Appeals Council.

b. Appeals Council review of an ALJ's initial decision should be limited to the evidence of record compiled before the ALJ. Where the claimant seeks review of an ALJ's refusal to reopen the record for the submission of new and material evidence, the Appeals Council should remand the case of the ALJ (preferably the one who originally heard the case if he or she is promptly available), if it finds the ALJ improperly declined to reopen the record. The Appeals

Council should not review the merits itself or issue a decision considering the new evidence, unless remand would result in substantial injustice or unreasonable delay.[2]

Citations:

55 FR 34213 (August 22, 1990)

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[2] Congress may at some time in the future need to consider whether it may want to provide for judicial review of Appeals Council determinations not to reopen the record. *Cf.* Califano v. Sanders, 430 U.S. 99 (1977).