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## Administrative Conference of the United States

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### **SSA DISABILITY BENEFITS ADJUDICATION PROCESS: ASSESSING THE IMPACT OF THE REGION I PILOT PROGRAM**

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This report was prepared by the Office of the Chairman of the Administrative Conference of the United States. The views expressed do not necessarily reflect those of the Council, the members of the Conference, or its committees.

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## EXECUTIVE SUMMARY

There are several reasons why “closing the record” is an important part of the adjudicatory structure: (1) timeliness—a decision cannot be rendered until all relevant evidence and information are before the decision-maker<sup>1</sup>; (2) fairness—the parties to a proceeding must have access to all evidence and information<sup>2</sup>; and (3) accuracy—the “case” must have a beginning and an end in order to be decided and evaluated.<sup>3</sup> While the Social Security Administration (“SSA”)’s disability benefits adjudication process is nonadversarial, most of the reasons for closing the record cited above have relevance both as to SSA Appeals Council review and for quality assurance purposes. This does not mean that exceptions for good cause cannot be made, but rather that the case as a unit of analysis must be preserved in order to be accurately evaluated. SSA’s Region I pilot program, which is intended to close the evidentiary record five days before the hearing date subject to good cause exceptions (what we call “the five-day rule”), and which requires notice of the ALJ hearing 75 days before the hearing date (what we refer to as “the 75-day notice requirement”), provides a laboratory of sorts to test and compare these theoretical propositions.

Issuance of advance notices of hearings and closure of the administrative (evidentiary) records are well-established adjudicatory concepts. Different fora may employ varying timeframes, or provide divergent bases for exceptions, but it is the rare tribunal that does not use these dual techniques in some form. In this respect, the Region I pilot program—with its 75-day notice requirement and five-day rule—operates in familiar adjudication territory. In other respects, however, the pilot program represents a sea change for SSA in that it mandates issuance of hearing notices earlier (i.e., by about two months) and closure of the evidentiary record sooner (i.e., pre-hearing closure subject to good cause exceptions) as compared to regulations applicable to Social Security disability adjudications in the nine other SSA regions.

SSA commissioned the Administrative Conference of the United States (“Administrative Conference” or “Conference”), through its Office of the Chairman,<sup>4</sup> to study the impact of the Region I pilot program on the adjudication process and to examine stakeholders’ respective views of this program. We brought a variety of methodological approaches—and resources—to bear on these tasks. These efforts included: (1) analyzing SSA-provided data from case management and other management information systems; (2) administering online surveys to SSA Administrative Law Judges (“ALJs”) and Hearing Office Directors (“HODs”) on a nationwide basis; (3) interviewing 80 SSA officials holding a variety of positions, ranging from

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<sup>1</sup> See Soc. Sec. Admin., Federal Old-Age, Survivors, and Disability Insurance Benefits, Black Lung Benefits, and Supplemental Security Income for the Aged, Blind, and Disabled, Regulations for Determining Claimant Rights,

<sup>2</sup> See *The Challenges of Achieving Fair and Consistent Disability Decisions: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 113th Cong. 6 (2013) (statement of David G. Hatfield, A.L.J. (ret.)), available at [http://waysandmeans.house.gov/uploadedfiles/hatfield\\_testimony32013.pdf](http://waysandmeans.house.gov/uploadedfiles/hatfield_testimony32013.pdf) (noting that “[t]he ALJ needs all the facts to provide a full, inquisitorial hearing and make a reasoned decision”).

<sup>3</sup> See ABA HOUSE OF DELEGATES, REPORT 115, at 17 (1995) [hereinafter ABA REPORT] (noting that “[n]o appellate system can function under . . . circumstances” in which “claimants . . . are able to keep a case spinning for any number of years, up and down the [appellate] ladder”).

<sup>4</sup> While this report is issued by the Office of the Chairman of the Administrative Conference, for ease of reference, this Office is referred to herein as simply the “Administrative Conference” or “Conference.” The views expressed in this report are those of the Chairman and staff of the Administrative Conference, and do not necessarily reflect those of the members of the Conference or its committees.

ALJs, to decision writers, to Appeals Council officials; (4) meeting with representatives from five private organizations (such as the National Organization of Social Security Claimants' Representatives, the Association of Administrative Law Judges, and the American Bar Association) who provided a range of perspectives on the Region I pilot program and, more generally, the SSA disability benefits adjudication process; and, (5) researching the legal and historical underpinnings of the pilot program, as well as the record closure practices in other federal administrative adjudication programs.

This report examines the impact of the Region I pilot program and provides guiding principles to SSA. Part I provides a brief overview of scholarly and judicial theories on closure of the evidentiary record in administrative proceedings at the hearing and appellate levels. Part II summarizes SSA's past regulatory initiatives concerning, and current standards for, issuance of notices of hearing and submission of evidence. Part III represents the analytical heart of the report. To the task of quantitatively assessing the impact of the Region I pilot program, we took primarily a comparative approach—namely, comparing the results from analyses of SSA-provided data for, and survey responses from, Region I (which employs the pilot program) with other regions (predominantly, Regions VII and VIII) in which different notice of hearing and evidentiary submission rules apply. In this part, we summarize the results from our comparative empirical studies, interviews with stakeholders, and judicial decisions where the disallowance of untimely evidence was at issue. (An accompanying appendix provides, among other things, complete results from our empirical studies and surveys.)<sup>5</sup> Part IV explores the record closure practices of other federal agencies in their respective administrative adjudication proceedings. Finally, Part V closes the report by offering guiding principles and other observations that SSA wish to consider when contemplating future efforts in this area, including potential expansion of the pilot program outside Region I. We highlight some of our findings immediately below.

From an empirical perspective, our analyses of SSA-provided data showed that the pilot program, as currently implemented in Region I, appears to be making modest strides toward advancing the goals set forth by SSA at its inception—namely, improving the efficiency, accuracy, and timeliness of the Social Security disability benefits adjudication process. We compared the three regions (i.e., Regions I, VII, and VIII)—along with national averages—across the same key variables relating to case processing efficiency, record development, remand rates on certain evidentiary issues, timing and volume of evidentiary submissions, and the time interval between notice and hearing. For some of these variables, our analyses did not suggest strong correlations between the pilot program and potential (theorized) effects such as decreasing the number of cases placed in post-hearing status, or reducing average case processing times. This is likely due, in whole in part, to the fact that the sources for SSA's data were agency-wide case processing and management systems, rather than databases tailored to the pilot program.

Nevertheless, our empirical analyses produced several notable results. Foremost among these findings is that the Region I pilot program (and, most particularly, the five-day rule) may be literally “bending the curve” in terms of the volume and timing of evidentiary submissions relative to the hearing date. Analysis of SSA data covering the past three years shows that, in Region I, documents have been submitted with greater frequency in the 6-20 days before

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<sup>5</sup> See APPENDIX TO SSA DISABILITY BENEFITS ADJUDICATION PROCESS: ASSESSING THE IMPACT OF THE REGION I PILOT PROGRAM (Dec. 23, 2013) [hereinafter APPENDIX TO REPORT ON REGION I PILOT PROGRAM].



hearings (and, concomitantly, with less frequency in the 0-5 days before hearings, during hearings, or post-hearing) compared to the two other studied regions and the nation. While the data were not sufficiently robust to establish a clear causal link to the pilot program, this finding nonetheless suggests an empirical correlation between the pilot program and earlier submission of documents relative to hearings.

In addition, our data analyses showed that, since 2007 (i.e., the first full year of the pilot program), the average annual time interval between issuance of the hearing notice and the hearing date have risen faster and higher in Region I than in either of its sister regions (Regions VII and VIII) or the nation as a whole. This trend suggests a strong correlation between the pilot program's 75-day notice requirement and Region I's fast-rising average time interval between notice and hearing. However, given that such time intervals also rose significantly across all regions over the same eight-year time period (albeit at a slower pace), it is also likely that there are other causal factors at play beyond simply the 75-day notice requirement. More detailed data would be needed to conduct the types of statistical analyses sufficient to formulate more definitive causal attributions.

Another key aspect of this study involved interviews and surveys of SSA ALJs and other hearing office staff throughout the country to get their views on—and “real world” practices under—the pilot program. Across all regions, strong majorities of ALJs and HODs responding to our surveys viewed the pilot program favorably and supported its expansion outside Region I. Perceived benefits included encouraging parties to timely submit evidence before hearings, improving the evidentiary record, and allowing more efficient adjudication of cases. About the only potential negative effects on claimants with which ALJs and hearing office staff voiced modest concerns, in both survey in interview responses, were: (1) difficulties faced by unrepresented claimants in understanding and adhering to the five-day rule, and (2) delayed production of requested medical records by health care providers which, in turn, could impede timely submission of evidence. (These concerns, among others, are also shared by the representative community).

With respect to current practices relating to implementation of the pilot program in Region I, we learned through interviews and surveys that, while the 75-day notice requirement is regularly followed by most hearing offices, implementation of the five-day rule varies throughout the region. These variations arise for a variety of reasons, including: (1) claimants and representatives fail to timely submit evidence; (2) when evidence is submitted less than five days before a hearing, some ALJs nonetheless invariably allow late evidentiary submissions without inquiry; and (3) ALJs have different perspectives on their discretion under the five-day rule, as well as circumstances satisfying the “good cause” exception. Accordingly, even though views of the pilot program are favorable throughout hearing offices in Region I, variations in implementation and application of the pilot program—predominantly relating to the five-day rule—makes assessing the overall “real-world” impact (or potential impact) of the pilot program particularly challenging.

Finally, the report concludes with guiding principles and other observations the agency may wish to consider when assessing the status of the current pilot program in Region I and expansion possibilities. Chief among the principles is the agency's commitment to the program,

especially in its messaging and enforcement of the five-day rule. Uncertainty in some quarters about the agency’s commitment to the program may be leading to varying document submission practices among claimants or their representatives, as well as uneven application of the five-day rule by ALJs and the Appeals Council. We also suggest that the agency capture data specifically tailored to key aspects of the pilot program to facilitate program assessment and, if warranted, modifications or improvements. Moreover, in lieu of the current formulation of the good cause exception—an exception which has three-prongs, only one of which must be satisfied for admission of untimely evidence—the agency may wish to consider introducing a balancing approach whereby adjudicators weigh specific, enumerated factors in order to determine whether to admit untimely evidence. Lastly, we suggest that the agency consider the needs of stakeholders, communicate and support whatever regulatory approaches the agency decides to take with respect to the pilot program, and ensure that, if some form of record closure and/or hearing notice requirements are retained, these rules are being consistently enforced across all applicable regions. The Administrative Conference believes that with SSA’s experience and knowledge, as well as the information in this report, the agency is well-equipped to determine how to best proceed.

## I. THEORY OF CLOSING THE RECORD

Closing the administrative record—as an instrument to promote timeliness, fairness, and accuracy—is not a new concept. The House Committee on Ways and Means, Subcommittee on Social Security debated this idea as early as 1975.<sup>6</sup> Legislation—which did not pass—was proposed five years later in the House that would have introduced a “modified closed record requirement” into the adjudicatory process.<sup>7</sup> Both the Social Security Advisory Board (“SSAB”) and academics have weighed in on this idea for years.<sup>8</sup> The Social Security Administration (“SSA”) itself has developed various regulatory proposals over the course of the past decade relating to the timing of hearing notices and closure of the record.<sup>9</sup> The

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<sup>6</sup> See Frank R. Lindh, *An Examination of the Proposed “Closed Record” Administrative Law Judge Hearing in the Social Security Disability Program*, 6 W. NEW ENG. L. REV. 745, 763-65 (1984) [hereinafter *An Examination of the Proposed “Closed Record”*].

<sup>7</sup> *Id.* at 766 (internal quotation marks omitted).

<sup>8</sup> See SOC. SEC. ADVISORY BD., CHARTING THE FUTURE OF SOCIAL SECURITY’S DISABILITY PROGRAMS: THE NEED FOR FUNDAMENTAL CHANGE (2001) (encouraging Congress and SSA to again review whether the record should close after the ALJ decision); FRANK S. BLOCH, JEFFERY S. LUBBERS & PAUL R. VERKUIL, SOC. SEC. ADVISORY BD., INTRODUCING NONADVERSARIAL GOVERNMENT REPRESENTATIVES TO IMPROVE THE RECORD FOR DECISION IN SOCIAL SECURITY DISABILITY ADJUDICATIONS: A REPORT TO THE SOCIAL SECURITY ADVISORY BOARD (2003) [hereinafter A REPORT TO THE SSAB] (recommending that SSA close the record after the ALJ hearing, subject to certain qualifications); Frank S. Bloch, Jeffery S. Lubbers & Paul R. Verkuil, *The Social Security Administration’s New Disability Adjudication Rules: A Significant and Promising Reform*, 92 CORNELL L. REV. 235 (2007) (expressing cautious optimism about the Disability Service Improvement (“DSI”) program, including closing the record); Robert E. Rains, *A Response to Bloch, Lubbers & Verkuil’s The Social Security Administration’s New Disability Adjudication Rules: A Significant and Promising Reform*, 92 CORNELL L. REV. 249 (2007) (responding to others’ assessment of DSI and praising the 75-day notice requirement).

<sup>9</sup> See 1988 Draft Proposal, *supra* note 1; Soc. Sec. Admin., Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424, 16,427 (Mar. 31, 2006) (to be codified at 20 C.F.R. pts. 404, 405, 416, 422) [hereinafter 2006 Final Rule]; Soc. Sec. Admin., Amendments to the Admin. Law Judge, Appeals Council, and Decision Review Bd. Appeals Levels, Proposed Rules, 72 Fed. Reg. 61,218-45 (Oct. 29, 2007) [hereinafter 2007 Proposed Rules].

Administrative Conference of the United States, too, has issued recommendations and reports on these and other aspects of SSA’s disability benefits adjudication process.<sup>10</sup>

As scholars have noted, “[t]he concept of ‘closing’ a record arises in two very different contexts: preparing a record for decision and preserving a record of decision for review.”<sup>11</sup> In an administrative hearing, the administrative law judge (“ALJ”) reviews evidence in order to come to a decision determining the rights of a party. A hearing should be a “forum for receiving testimony and testing the evidence, not . . . a forum for initially presenting new documentary evidence.”<sup>12</sup> As one retired SSA ALJ recently stated in his congressional testimony:

The ALJ needs all the facts to provide a full, inquisitorial hearing and make a reasoned decision. Too often hearings become essentially discovery proceedings, where salient facts and evidence are being introduced for the first time, without the benefit of review or thought. This naturally protracts the process and some decisions are issued without consideration of all the facts.<sup>13</sup>

The Social Security Act sets forth the dual mandate that ALJs—as the decision-making delegates of the Commissioner—“make findings of fact, and decisions as to the rights of any individual applying for payment,”<sup>14</sup> and that the decision be based on “evidence adduced at the hearing.”<sup>15</sup> If material evidence is submitted in an untimely manner that precludes the ALJ from reviewing the record prior to the hearing, the ALJ’s ability to fulfill his or her statutory mandate is necessarily hampered. As SSA noted in the preamble to a proposed rulemaking over 20 years ago:

The hearing process cannot function well or efficiently if additional evidence is submitted so late that the ALJ is unable to assess it as necessary to inquire fully into the issues at the hearing. Additional evidence may be too voluminous and complex to be assessed quickly. It may present new issues or require that other additional evidence be obtained.<sup>16</sup>

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<sup>10</sup> See Admin. Conf. of the U.S., Recommendation 78-2, *Procedures for Determining Social Security Disability Claims*, 43 Fed. Reg. 27,508 (June 26, 1978); Admin. Conf. of the U.S., Recommendation 86-7, *Case Management as a Tool for Improving Agency Adjudication*, 51 Fed. Reg. 46,989 (Dec. 30, 1986); Admin. Conf. of the U.S., Recommendation 87-6, *State-Level Determinations in Social Security Disability Cases*, 52 Fed. Reg. 49,142 (Dec. 30, 1987); Admin. Conf. of the U.S., Recommendation 87-7, *A New Role of the Social Security Appeals Council*, 52 Fed. Reg. 49,143 (Dec. 30, 1987); Admin. Conf. of the U.S., Recommendation 90-4, *Social Security Disability Program Appeals Process: Supplementary Recommendation*, 55 Fed. Reg. 34,213 (Aug. 22, 1990). For relevant sections, see APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, at App. K.

<sup>11</sup> A REPORT TO THE SSAB, *supra* note 8, at 40 (recommending that SSA close the record after the ALJ hearing, subject to certain qualifications).

<sup>12</sup> 1988 Draft Proposal, *supra* note 1, at 9.

<sup>13</sup> *The Challenges of Achieving Fair and Consistent Disability Decisions: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 113th Cong. 6-7 (2013) (statement of David G. Hatfield, A.L.J. (ret.)), available at [http://waysandmeans.house.gov/uploadedfiles/hatfield\\_testimony32013.pdf](http://waysandmeans.house.gov/uploadedfiles/hatfield_testimony32013.pdf).

<sup>14</sup> 42 U.S.C. § 405(b)(1) (2011); see also *id.* § 1383(c)(1)(A) (2011).

<sup>15</sup> *Id.*

<sup>16</sup> See Soc. Sec. Admin., Federal Old-Age, Survivors, and Disability Insurance Benefits, Black Lung Benefits, and Supplemental Security Income for the Aged, Blind, and Disabled; Regulations for Determining Claimant Rights; Proposed Rule Draft 9 (1988).

A complete evidentiary record is no less important at the appellate level of the adjudication process. The Appeals Council has discretionary authority to review cases in which there has been an abuse of discretion or an error of law, or where the findings are not supported by substantial evidence, or where a policy or procedural issue needs to be resolved.<sup>17</sup> This task is necessarily made more difficult if the record it reviews is materially different from the record at the ALJ hearing level. As the American Bar Association (“ABA”) observed:

[E]vidence of record [in SSA disability benefits claims] is a moving target and subject to change at every level except the last. As a result, claimants and their [representatives] are able to keep a case spinning for any number of years, up and down the ladder. No appellate system can function under such circumstances; nor does due process require such an open-ended opportunity to make one’s case. Rules of finality are required to get and keep the backlog under control.<sup>18</sup>

Similarly, in an analogous context, the Supreme Court emphasized the importance of record finality to the adjudicatory process:

Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated. . . . If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.<sup>19</sup>

Although the Supreme Court was speaking in particular about the reopening context, the principle holds true for closing the record. If claimants are allowed to submit evidence at any time, there is “little hope that the administrative process could ever be consummated” because it would always be subject to augmentation.

## **II. ADJUDICATION OF DISABILITY BENEFITS CLAIMS: PROCESS & LEGAL STANDARDS**

### **A. Summary of SSA’s Disability Benefits Adjudication Process**

The Social Security Act created two programs—Social Security Disability Insurance (“SSDI”) and Supplemental Security Income (“SSI”)—to provide monetary benefits to persons with disabilities who satisfy these programs’ respective requirements.<sup>20</sup> Individuals may qualify for benefits if, among other things, they can show that they have a disabling impairment.<sup>21</sup> The programs share the same definition of disability: the inability “to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which

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<sup>17</sup> See 20 C.F.R. §§ 404.970, 416.1470 (2012).

<sup>18</sup> ABA REPORT, *supra* note 3, at 17.

<sup>19</sup> *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 554-55 (1978) (quoting *ICC v. Jersey City*, 322 U.S. 503, 514 (1944)) (internal quotation marks omitted).

<sup>20</sup> See 42 U.S.C. §§ 401(b), 1381 (2011).

<sup>21</sup> See *id.* §§ 423(d)(2)(A), 1382c(a)(3)(B) (2011).

can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”<sup>22</sup> Every year, millions of people apply for SSDI and SSI benefits,<sup>23</sup> and SSA has created what may be the world’s largest adjudicative system to process these claims.<sup>24</sup>

The disability benefits adjudication process begins with the filing of an application, either in-person at an SSA field office or online.<sup>25</sup> Individuals seeking disability benefits may file (and pursue) their own claims or they may choose to enlist the assistance of a representative, who may or may not be an attorney.<sup>26</sup> Once an application is received by the SSA field office, (in most instances) the case is sent to a federally funded state Disability Determination Service (“DDS”) for the initial steps in the adjudication process.<sup>27</sup> In most states, a team consisting of a state disability examiner and a state agency medical and/or psychological consultant makes an initial determination of eligibility on behalf of SSA.<sup>28</sup> The DDS team may gather medical documents and/or order an examination by a contracting physician or psychologist, termed a consultative examination (“CE”), to evaluate the claimant’s disability status.<sup>29</sup> If an individual’s claim is initially denied by the first DDS team, (in most states) the claimant may seek reconsideration<sup>30</sup> by another DDS team, composed of a different examiner and medical or psychological consultant.<sup>31</sup> As a whole, about 40% of disability claims are collectively allowed at the initial determination and reconsideration steps at the state DDS level.<sup>32</sup>

A claimant who is dissatisfied with the outcome of his or her claim at the state DDS level may, in turn, request a hearing before a SSA ALJ.<sup>33</sup> The ALJ reviews the case de novo; no deference is afforded the DDS determination. The hearing before an ALJ may be held on the written record, in-person, by video teleconferencing or telephone.<sup>34</sup> An ALJ may consider additional medical examinations, vocational or medical expert testimony, or other non-medical

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<sup>22</sup> *Id.* § 423(d)(1)(A) (2011); *see also id.* § 1382c(a)(3)(A) (2011).

<sup>23</sup> In fiscal year (“FY”) 2012, over 3.2 million people applied for disability benefits. *See* SOC. SEC. ADMIN., FISCAL YEAR 2012 PERFORMANCE AND ACCOUNTABILITY REPORT 8 (2012), *available at* <http://www.ssa.gov/finance/2012/Full%20FY%202012%20PAR.pdf>.

<sup>24</sup> *See Securing the Future of the Disability Insurance Program: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 112th Cong. 1 (2012) (statement of Michael Astrue, Comm’r, Soc. Sec. Admin.) [hereinafter *Astrue Testimony*], *available at* [http://waysandmeans.house.gov/uploadedfiles/mikeastrue\\_ss\\_6\\_27\\_12.pdf](http://waysandmeans.house.gov/uploadedfiles/mikeastrue_ss_6_27_12.pdf); *see also* Heckler v. Campbell, 461 U.S. 458, 461 n.2 (1983) (quoting JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS xi (1978)).

<sup>25</sup> *See* 20 C.F.R. §§ 404.614, 416.325 (2012).

<sup>26</sup> *See id.* §§ 404.1705, 416.1505 (2012).

<sup>27</sup> *See id.* §§ 404.1613-18, 416.1013-18 (2012).

<sup>28</sup> *See* 42 U.S.C. §§ 405(b), 1383(c)(1) (2011).

<sup>29</sup> *See* Charles H. Koch, Jr., *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration’s Appeals Council*, 17 FLA. ST. U. L. REV. 199, 219 (1990) (describing the disability claims process).

<sup>30</sup> *See* 20 C.F.R. §§ 404.907, 416.1407 (2012); *Astrue Testimony*, *supra* note 24, at \*1.

<sup>31</sup> *See* 20 C.F.R. §§ 404.909, 416.1409 (2012); *Astrue Testimony*, *supra* note 24, at \*2.

<sup>32</sup> *See* SOC. SEC. ADVISORY BD., ASPECTS OF DISABILITY DECISION MAKING: DATA AND MATERIALS 44 fig. 39 (2012), *available at* [http://www.ssab.gov/Publications/Disability/GPO\\_Chartbook\\_FINAL\\_06122012.pdf](http://www.ssab.gov/Publications/Disability/GPO_Chartbook_FINAL_06122012.pdf) [hereinafter SSAB 2012 REPORT] (providing specific figures and differences in allowance rates among the states).

<sup>33</sup> *See* 42 U.S.C. §§ 405(b)(1), 1383(c)(1)(A) (2011); 20 C.F.R. §§ 404.929, 416.1429 (2012); *Astrue Testimony*, *supra* note 24, at \*1.

<sup>34</sup> *See* 42 U.S.C. §§ 405(b), 1383(c) (2011); 20 C.F.R. §§ 404.929, 416.1429 (2012); *Astrue Testimony*, *supra* note 24, at \*4.

evidence (e.g., earning records, statements from third parties, school reports), as well as question the claimant or other witnesses personally.<sup>35</sup> In contrast to most administrative adjudications, these hearings are nonadversarial—that is, the agency is not represented at the hearing.<sup>36</sup> ALJs have an affirmative duty to develop the record where needed, irrespective of whether the claimant is represented.<sup>37</sup> Currently, about 80% of claimants are represented, predominantly by attorneys.<sup>38</sup> ALJs currently determine that disability is warranted in roughly 50% of the cases decided.<sup>39</sup>

A claimant may appeal an ALJ decision to the Appeals Council, which has discretionary authority to deny or grant review.<sup>40</sup> The Appeals Council will review a case if: (1) the ALJ committed an abuse of discretion; (2) there is an error of law; (3) the ALJ's decision was not supported by substantial evidence; or (4) there is a broad policy issue that may affect the public interest.<sup>41</sup> In most cases, if new and material evidence is submitted and it relates to the period on or before the ALJ hearing decision, the Appeals Council will evaluate the record and review the case if it finds that the ALJ's actions, findings, or conclusion are contrary to the weight of the evidence.<sup>42</sup> If the Appeals Council grants review, it may affirm, modify, reverse, or remand the ALJ's decision.<sup>43</sup> If, instead, the Appeals Council denies review, the ALJ's decision becomes the final agency action.<sup>44</sup>

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<sup>35</sup> See 20 C.F.R. §§ 404.929-61; 416.1429-61 (2012).

<sup>36</sup> The Department of Veterans Affairs ("VA") is the other most notable example. See, e.g., *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (discussing "the historically non-adversarial system of awarding benefits to veterans" and stating that "[t]his court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant"); see also *Henderson v. Shinseki*, 131 S. Ct. 1197, 1206 (2011) (referring to proceedings before the VA as "informal and nonadversarial").

<sup>37</sup> E.g., *Hildebrand v. Barnhart*, 302 F.3d 836, 838 (8th Cir. 2002) (describing the duty of an ALJ to "fully and fairly develop[] the facts of the case"); *Byes v. Astrue*, 687 F.3d 913, 915-16 (8th Cir. 2012) (same); *Thornton v. Schweiker*, 663 F.2d 1312, 1316 (5th Cir. 1981) (same); see also *Sims v. Apfel*, 530 U.S. 103, 111 (2000) (noting "ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits"); *Richardson v. Perales*, 402 U.S. 389, 410 (1971) (noting adjudicator's duty to develop the facts). The ALJ's duty to develop the record is "less pronounced when . . . a claimant is represented by counsel." *Newcomb v. Astrue*, No. 2:11-CV-02-GZS, 2012 WL 47961, at \*10 (D. Me. Jan. 6, 2012), *aff'd*, No. 2:11-CV-02-P-S, 2012 WL 206278 (D. Me. Jan. 24, 2012) (citing as examples, *Heggarty v. Sullivan*, 947 F.2d 990, 997 (1st Cir. 1991) and *Hawkins v. Chater*, 113 F.3d 1162, 1167-68 (10th Cir. 1997)).

<sup>38</sup> See APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, at App. D, tbl. A-2 & fig. A-2, p. A-12. The percentage of cases in which claimants are represented has greatly increased in the past 30 years. The percentage of claimants represented by attorneys at ALJ hearings has nearly doubled from 1977 to 2010 (from about 35% to 76%), while the use of non-attorney representatives has also experienced a steady increase since 2007. See SSAB 2012 REPORT, *supra* note 32, at 60 fig. 55.

<sup>39</sup> See ADMIN. CONFERENCE OF THE U.S., STATISTICAL APPENDIX TO ACHIEVING GREATER CONSISTENCY IN SOCIAL SECURITY DISABILITY ADJUDICATION: AN EMPIRICAL STUDY AND SUGGESTED REFORMS 13-16 (2013), available at <http://www.acus.gov/research-projects/social-security-disability-adjudication>. The allowance rate of ALJ dispositions in FY 2012 was 48%. See *id.* at 15. When combining ALJ and senior attorney decisions—senior attorneys are authorized to make fully favorable decisions on the record—the allowance rate in FY 2012 was 50%. See *id.*

<sup>40</sup> See 20 C.F.R. §§ 404.967-68, 416.1467-68 (2012).

<sup>41</sup> See *id.* §§ 404.970, 416.1470 (2012).

<sup>42</sup> See *id.*

<sup>43</sup> See *id.* §§ 404.979, 416.1479 (2012).

<sup>44</sup> See *id.* §§ 404.981, 416.1481 (2012). A final determination or decision may be reopened by the agency of its own accord or based on a request from the claimant. See *id.* §§ 404.987, 416.1487 (2012). In either instance, the determination or decision may be revised. See *id.*

A claimant who is dissatisfied with the agency's final action may seek judicial review in federal district court.<sup>45</sup> The district court can affirm the agency's final action, or remand the matter to the agency, either for an award of benefits or for further proceedings.<sup>46</sup>

## **B. SSA Legal Standards: Hearing Notices & Submission of Evidence**

Without a record, one can neither (1) make a decision granting or denying SSDI or SSI disability benefits nor (2) review a previous adjudicator's decision. However, the biggest challenge in compiling the record is the often-changing condition of the claimant. A claimant's health may either deteriorate or improve as his or her claim progresses through the administrative process. In view of this "moving target," when is the record considered complete so that a decision may be made? What constitutes "the record" for purposes of review? Are there procedures in place to either allow for submission of additional evidence later in the appeal process or reopen a deficient decision? Does the claimant or representative have adequate time to gather and submit evidence for the record? This next part describes the existing legal standards governing these issues, as well as the practices in hearing offices.

### ***1. Social Security Act***

The Social Security Act invests the Commissioner of Social Security with "full power and authority to make rules and regulations and to establish procedures . . . which are necessary or appropriate to carry out [the] provisions" of the Act in order to establish entitlement to disability benefits.<sup>47</sup> The Act also requires the Commissioner to "adopt reasonable and proper rules and regulations to regulate and provide for . . . the method of taking and furnishing" evidence.<sup>48</sup> As the Supreme Court has emphasized on several occasions, this statutory authority is "exceptionally broad."<sup>49</sup> The Commissioner thus has wide latitude to issue regulations establishing the processes by which evidence is submitted and hearings are conducted.

Disability, in turn, is defined under the Act as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."<sup>50</sup> In order to determine whether a claimant has a disability, the agency must make "findings of fact[] and decisions."<sup>51</sup> If the agency's disability decision is unfavorable to the claimant, he or she may appeal. The agency is required to "give such

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<sup>45</sup> 42 U.S.C. §§ 405(g), 1383(c)(3) (2011); 20 C.F.R. §§ 404.981, 416.1481 (2012). A claimant must exhaust all administrative remedies before appealing to federal court.

<sup>46</sup> See 42 U.S.C. §§ 405(g), 1383(c)(3) (2011). Historically, federal district courts have reversed very few agency actions. In FY 1995 – 2010, the average reversal rate was just over 5%. See SSAB 2012 REPORT, *supra* note 32, at 70 fig. 65b. Of the remaining cases, district courts affirm about half of SSA's decisions, and remand the other half to the agency for further proceedings. See *id.*

<sup>47</sup> 42 U.S.C. § 405(a) (2011).

<sup>48</sup> *Id.*

<sup>49</sup> See, e.g., *Bowen v. Yuckert*, 482 U.S. 137, 145 (1987) (quoting *Heckler v. Campbell*, 461 U.S. 458, 466 (1983) (quoting *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981))).

<sup>50</sup> 42 U.S.C. § 423(d)(1)(A) (2011); see also *id.* § 1382c(a)(3)(A) (2011).

<sup>51</sup> *Id.* §§ 405(b)(1), 1383(c)(1)(A) (2011).

applicant . . . reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, [must], on the basis of evidence adduced at the hearing, affirm, modify, or reverse the [agency’s] findings of fact and such decision.”<sup>52</sup>

After the agency issues a final decision, it may be reversed and remanded by a federal court. “Sentence Six”—so-called because it is the sixth sentence in 42 U.S.C. 405(g)—clothes the court with authority to “order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material *and* that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding.” Therefore, the claimant bears the burden of demonstrating that the new evidence he or she submits to the court is material to the decision and he or she had good reason for not submitting it earlier. If the claimant meets this high statutory bar, the court will reverse and remand the case to the agency so that it reconsiders the case, including this new evidence.

## **2. Regulations Governing Regions II – X**

This next part will discuss the regulations that govern timing of evidentiary submissions and noticing of hearings that apply to Regions II-X.<sup>53</sup> In the introduction to the section of the regulations that details the process by which determinations and decisions are made and reviewed, the agency emphasizes the “informal, nonadversary manner”<sup>54</sup> of the administrative review process (i.e., the ALJ hearing and Appeals Council review). The introduction continues by linking that informal, nonadversarial process with an open record by noting that at “each step of the review process, [the claimant] may present any information” to support his or her case.<sup>55</sup> Except for certain limitations at the Appeals Council stage of review, the agency “will consider . . . any information [the claimant] present[s] as well as all the information” it already has.<sup>56</sup> These provisions allowing the record to be supplemented throughout the administrative process exist in tension with the agency’s preference for early evidence submission.

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<sup>52</sup> *Id.* § 405(b)(1) (2011); *see also id.* § 1383(c)(1)(A) (2011).

<sup>53</sup> As a general matter, most of SSA’s ten regions encompass a unique group of neighboring states. Region II is comprised of New York, New Jersey, and Puerto Rico; Region III of Maryland, West Virginia, Virginia, Delaware, Pennsylvania, and Washington, D.C.; Region IV of Georgia, Alabama, South Carolina, North Carolina, Tennessee, Florida, Mississippi, and Kentucky; Region V of Ohio, Illinois, Michigan, Indiana, Wisconsin, and Minnesota; Region VI of New Mexico, Louisiana, Texas, Arkansas, and Oklahoma. Region VII of Missouri, Nebraska, and Iowa; Region VIII of Montana, Idaho, Wyoming, Colorado, North Dakota, South Dakota, and Utah; Region IX of California, Hawaii, Nevada, and Arizona; Region X of Alaska, Oregon, and Washington. There are two exceptions to this general regional set up. First, SSA does have small service areas in a few states that “cross borders” in the sense that that service area is part of one region, while the rest of the state is part of another region. For example, the Cincinnati, OH hearing office in Region V has a service area in northern Kentucky, which is part of Region IV. Second, the National Hearing Centers (“NHC”) include five offices—one each in Virginia, New Mexico, Illinois, Maryland, and Missouri—and adjudicates claims by video teleconferencing. *See* SOC. SEC. ADMIN. OFFICE OF THE INSPECTOR GEN., NO. A-12-11-11147, THE ROLE OF THE NATIONAL HEARING CENTERS IN REDUCING THE HEARINGS BACKLOG 1-2 (2012), *available at* <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-11-11147.pdf>. NHC procedures are usually determined by the region from which the claim originated, rather than the geographical location of the NHC office overseeing its adjudication.

<sup>54</sup> 20 C.F.R. §§ 404.900(b), 416.1400(b) (2012).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*



At the hearing level, the agency not only encourages claimants to submit evidence within 10 days of requesting the hearing,<sup>57</sup> but also requests “[a] statement of additional evidence to be submitted and the date [the claimant] will submit it.”<sup>58</sup> Although these provisions encourage prompt submission of evidence, as well as advance notification of the evidence the claimant expects to submit in the future, other provisions effectively only request claimants to ensure that evidence is available at the hearing.<sup>59</sup> Claimants, then, may “submit new evidence”<sup>60</sup> at the hearing and the ALJ will “issue a decision based on the hearing record.”<sup>61</sup> Notice of the hearing before an ALJ must be issued “at least 20 days before the hearing.”<sup>62</sup>

If the claimant appeals to the Appeals Council,<sup>63</sup> he or she has an additional, though limited, opportunity to submit evidence. The evidence must be “new and material”<sup>64</sup> and must “relate[] to the period on or before the date of the [ALJ] hearing decision.”<sup>65</sup> If the evidence meets these criteria, the Appeals Council will grant review “if it finds that the [ALJ]’s action, findings, or conclusion is contrary to the weight of the evidence currently of record.”<sup>66</sup>

### **3. Region I Pilot Program**

The regulations that govern Region I<sup>67</sup> relating to timing of evidentiary submissions and noticing of hearing differ from those governing Regions II-X in significant respects.<sup>68</sup> First, the

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<sup>57</sup> See *id.* §§ 404.935, 416.1435 (2012) (“If possible, the evidence or a summary of evidence you wish to have considered at the hearing should be submitted to the administrative law judge with the request for hearing or within 10 days after filing the request.”).

<sup>58</sup> *Id.* §§ 404.933(a)(3), 416.1433(a)(3) (2012).

<sup>59</sup> See *id.* §§ 404.935, 416.1435 (2012) (“Each party shall make every effort to be sure that all material evidence is received by the administrative law judge or is available at the time and place set for the hearing.”).

<sup>60</sup> *Id.* §§ 404.929, 416.1429 (2012). When describing the decision of the ALJ, the regulations reaffirm the permissibility of submitting evidence at the hearing by stating that the ALJ “must base the decision on the preponderance of the evidence offered at the hearing or otherwise included in the record.” *Id.* §§ 404.953, 416.1453 (2012).

<sup>61</sup> *Id.* §§ 404.929, 416.1429 (2012). The ALJ has discretion to either stop and reschedule the hearing, or reopen the hearing before he or she mails notice of a decision in order to receive evidence that is new and material to the claim. See *id.* §§ 404.944, 416.1444 (2012).

<sup>62</sup> *Id.* §§ 404.938, 416.1438 (2012).

<sup>63</sup> See *id.* §§ 404.967, 416.1467 (2012) (“If you or any other party is dissatisfied with the hearing decision or with the dismissal of a hearing request, you may request that the Appeals Council review that action.”).

<sup>64</sup> *Id.* §§ 404.970(b), 416.1470(b) (2012).

<sup>65</sup> *Id.*; see also *id.* § 404.976(b) (2012) (“The Appeals Council will consider all the evidence in the [ALJ] hearing record as well as any new and material evidence submitted to it which relates to the period on or before the date of the [ALJ] hearing decision.”); *id.* § 416.1476(b) (2012) (same).

<sup>66</sup> *Id.* § 404.970(b), 416.1470(b) (2012). The final opportunity to submit additional evidence at the agency level involves reopening the case. The claimant may request that his or her case be reopened, or the agency may reopen it of its own initiative. See *id.* §§ 404.987(a)-(b), 416.1487(a)-(b) (2012) (“We may reopen a final determination or decision on our own initiative, or you may ask that a final determination or a decision to which you were a party be reopened.”). In either instance, the agency may revise the decision. See *id.* §§ 404.987(b), 416.1487(b) (2012). Claims are seldom reopened.

<sup>67</sup> Region I is comprised of Massachusetts, Connecticut, New Hampshire, Vermont, Maine, and Rhode Island.

<sup>68</sup> These regulations, however, do similarly begin by affirming that the administrative process is conducted in a “non-adversarial manner.” 20 C.F.R. § 405.1(c) (2012).

regulations note that, unless the claimant agrees to a shorter period, he or she will be notified “of the time and place of the hearing at least 75 days before the date of the hearing.”<sup>69</sup>

Second, at the ALJ hearing level, three different tiers exist regarding the submission of evidence depending on the time at which such evidence is submitted. Any evidence submitted up until five days before the hearing will be admitted into the record. Evidence submitted at or after the hearing must meet increasingly higher standards in order to be admitted into the record:

**Table 1: Summary of Region I Record Closure Rule**

Tier	Timeframe	Evidence Accepted?
1 <sup>70</sup>	Until 5 days before the hearing	ALJ will accept the evidence
2 <sup>71</sup>	During 5 days before the hearing or at the hearing	ALJ will accept the evidence if: (1) agency’s action misled the claimant; (2) claimant had a limitation that prevented the evidence from being submitted earlier; <i>or</i> (3) unusual, unexpected, or unavoidable circumstance beyond the claimant’s control prevented the evidence from being submitted earlier
3 <sup>72</sup>	After the hearing, but before the decision is issued	ALJ will accept the evidence if: Claimant demonstrates that there is a <i>reasonable possibility that the evidence will affect the outcome</i> of his or her claim <i>and</i> (1) agency’s action misled the claimant; (2) claimant had a limitation that prevented the evidence from being submitted earlier; <i>or</i> (3) unusual, unexpected, or unavoidable circumstance beyond the claimant’s control prevented the evidence from being submitted earlier

Unless the Appeals Council accepts additional evidence into the record, “the official record closes once the [ALJ] issues his or her decision regardless of whether it becomes [the agency’s] final decision.”<sup>73</sup>

<sup>69</sup> *Id.* § 405.315(a) (2012); *see also id.* § 405.316(a) (2012) (“We will mail or serve the notice at least 75 days before the date of the hearing unless you agree to a shorter period.”).

<sup>70</sup> *See id.* § 405.331(a) (2012). The notice of the ALJ hearing informs the claimant that he or she must submit evidence “no later than five business days before the date of the scheduled hearing, unless” certain conditions are met. *See id.* § 405.316(b)(6) (2012).

<sup>71</sup> *See id.* § 405.331(b) (2012).

<sup>72</sup> *See id.* § 405.331(c) (2012).

<sup>73</sup> *Id.* § 405.360 (2012). For example, the Appeals Council may deny the claimant’s request for review. In this instance, the Appeals Council makes the final agency decision (i.e., denying review); the record is considered closed at the issuance of the ALJ decision.

A claimant in Region I—as in the other regions—may appeal to the Appeals Council.<sup>74</sup> However, the Appeals Council does not consider additional evidence under the same criteria as in other SSA regions. Rather, the Appeals Council will only consider additional evidence:

- “where it relates to the period on or before the date of the hearing decision;”<sup>75</sup> *and*
- “there is a *reasonable probability* that the *evidence . . . would change the outcome* of the decision;”<sup>76</sup> *and*
- one of these three circumstances apply:
  - the agency’s “action misled” the claimant;<sup>77</sup>
  - the claimant had a “limitation[] that prevented” the evidence from being submitted earlier;<sup>78</sup> *or*
  - “[s]ome other unusual, unexpected, or unavoidable circumstance beyond [the claimant’s] control prevented” the evidence from being submitted earlier.<sup>79</sup>

Unless additional evidence is admitted into the record because the claimant meets the above conditions, “the record is closed as of the date of the [ALJ’s] decision, and the Appeals Council will base its action on the same evidence that was before the [ALJ].”<sup>80</sup>

#### **4. Hearing Office Practices**

When the claimant submits a request to have an ALJ review the DDS’s determination, the field office that receives the request will assign it to the appropriate hearing office.<sup>81</sup> The request is received by the hearing office docket clerk into a queue of unassigned cases. For ALJs, cases are randomly assigned on a first-in, first-out basis.<sup>82</sup> Case technicians receive case assignments on a rotational basis. In many offices, the case technician develops the case record, which may involve requesting updated evidence or suggesting to an ALJ that the record requires additional factual development. In addition, as the claimant and/or his or her representative submit(s) evidence, the case technician prepares exhibits and maintains the electronic (docket) database. When a case is ready for scheduling, the full-time scheduler will schedule a case according to the ALJ’s availability. The scheduler will then issue a notice of hearing to the

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<sup>74</sup> See *id.* § 405.401(a) (2012).

<sup>75</sup> *Id.* § 405.401(c) (2012).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* § 405.401(c)(1) (2012).

<sup>78</sup> *Id.* § 405.401(c)(2) (2012).

<sup>79</sup> *Id.* § 405.401(c)(3) (2012).

<sup>80</sup> *Id.* § 405.430 (2012). The reopening guidelines are the same in Region I as in the other regions except in 2 significant respects. First, while in most of the country a decision may be reopened for good cause within 4 years for SSDI claims and within two years for SSI claims, in Region I, a decision may only be reopened for good cause within “six months from the date of the final decision.” *Id.* § 405.601(b) (2012). Second, the good cause exception in Region I does not include the furnishing of “new and material evidence,” but is limited to whether a clerical error in computing benefits was made or whether the evidence used to reach the decision facially demonstrates that an error was made. See *id.*

<sup>81</sup> Telephone interview with ODAR officials (June 20, 2013) (interview notes on file with authors). All information in this section was provided in this interview.

<sup>82</sup> There are a number of exceptions to the “first-in, first-out” policy. See Soc. Sec. Admin., HALLEX I-2-1-55D-Assignment of Service Area Cases to Administrative Law Judges (Feb. 12, 2009), available at [http://ssa.gov/OP\\_Home/hallex/I-02/I-2-1-55.html](http://ssa.gov/OP_Home/hallex/I-02/I-2-1-55.html). ALJs can also identify cases that can be paid on the record.

claimant at least 20 or 75 days before the hearing—depending on regional requirements—unless such notice is waived by the claimant.

The hearing office is managed by the hearing office chief ALJ (“HOCALJ”) and the hearing office director (“HOD”). The HOCALJ oversees the ALJs and the HOD oversees the other hearing office staff, including case technicians and decision writers. Case management practices between the time the case is assigned and the date the hearing is held vary among offices and ALJs.

At some point before the hearing, the ALJ and, if applicable, the medical and/or vocational expert review(s) the case. The ALJ then conducts the hearing, which may include examination of witnesses and collection of newly submitted evidence. If the ALJ determines that post-hearing record development is required, he or she may hold supplemental hearing(s), put the hearing into post-hearing status, and/or order a CE. Once such evidence (if any) is collected, the ALJ may either draft the decision or prepare instructions for the decision writer. If the latter, the decision writer drafts the decision and sends it to the ALJ. The ALJ then edits, signs, and issues the decision.

### **C. Past Agency Regulatory Initiatives: Hearing Notices & Submission of Evidence**

Region I is the only jurisdiction subject to the pilot program, which, as noted above, details different procedures regarding the timing both for issuance of hearing notices and for submission of evidence relative to the other nine SSA regions across the country. The next part reviews past regulatory efforts resulting in the creation of these procedures.<sup>83</sup>

#### **1. The Disability Service Improvement Program**

##### **a. 2003 Hearing: Announcement of Proposals for Reform**

Commissioner Jo Anne Barnhart served as Commissioner of SSA from 2001 to 2007.<sup>84</sup> Early in her tenure, she “began a comprehensive [s]ervice [d]elivery [a]ssessment to thoroughly examine all of SSA’s workloads.”<sup>85</sup> After a year and a half of research and outreach to stakeholders, the agency developed a plan to, among other things, “shorten decision times [and] pay benefits to people who are obviously disabled much earlier in the process.”<sup>86</sup> At a hearing before the Subcommittee on Social Security, Commissioner Barnhart announced SSA’s ideas to reform the system. Two of the key proposals aimed at getting rid of “the backlog and reduc[ing]

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<sup>83</sup> For initiatives that predate the 2000s, see APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, at App. C, pp. A-6 to A-8.

<sup>84</sup> See Soc. Sec. Admin., *Social Security Commissioners: Jo Anne B. Barnhart*, <http://www.socialsecurity.gov/history/barnhart.html> (providing the history of SSA commissioners) (last visited May 5, 2013).

<sup>85</sup> *Soc. Sec. Admin.’s Management of the Office of Hearings and Appeals: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 108th Cong. (Sept. 25, 2003) (statement of Jo Anne B. Barnhart, Commissioner, Social Security Administration) [hereinafter *Barnhart Sept. 2003 Testimony*], available at [http://www.ssa.gov/legislation/testimony\\_092503.html](http://www.ssa.gov/legislation/testimony_092503.html).

<sup>86</sup> Press Release, Soc. Sec. Admin., Commissioner Barnhart Presents Her Approach to Improving the Disability Determination Process (Sept. 25, 2003) (on file with authors).

the lengthy processing time<sup>87</sup> were (1) closing the record after the ALJ hearing and (2) eliminating the Appeals Council.<sup>88</sup>

Organizations that were invited to the hearing shared their views on SSA's proposal. The SSAB urged Congress to "revisit the possibility of closing the record after the hearing decision [wa]s made."<sup>89</sup> The Association of Administrative Law Judges ("AALJ")—a union representing primarily SSA ALJs—went further by advocating that the record be closed after the ALJ hearing.<sup>90</sup> The National Organization of Social Security Claimants' Representatives ("NOSSCR")—a claimants' representative organization—however, took the opposite view.<sup>91</sup> It recommended that the record be kept open for the admission of new evidence. The organization stated that circumstances such as worsening of claimants' conditions and delays in the production of evidence by medical providers, as well as the need to maintain an informal process, all pointed to why closing the record could be detrimental to claimants.<sup>92</sup>

#### **b. 2004 Hearing: Update on Reform Plan**

A year later, the Subcommittee on Social Security and the Subcommittee on Human Resources held a hearing in order to get an update on the agency's ideas for reform.<sup>93</sup> The Commissioner shared that SSA's driving motivation in its reform efforts was "to make the right decision [for the claimant] as early in the process as possible."<sup>94</sup> She stated that SSA was conducting an outreach campaign and "study[ing] all of the issues."<sup>95</sup> Commissioner Barnhart relayed that, in the course of its outreach efforts, some groups had expressed significant concerns about the concepts of closing the record and elimination of the Appeals Council.<sup>96</sup> Bases for such concern included: (1) the plan for record closure lacked good cause exceptions; (2) elimination of the Appeals Council would itself effectively close the record after the ALJ

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<sup>87</sup> *Barnhart Sept. 2003 Testimony*, *supra* note 85.

<sup>88</sup> *See id.* The Commissioner believed that the Appeals Council added unnecessary processing time since it usually supported the ALJ decision. *See id.* A number of SSA officials believe that Commissioner Barnhart did not fully understand the Appeals Council's work. *See* in-person interview with senior ODAR officials (Jan. 28, 2013) (interview notes on file with authors).

<sup>89</sup> *Soc. Sec. Admin.'s Management of the Office of Hearings and Appeals: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 108th Cong. (Sept. 25, 2003) (statement of Sylvester J. Schieber, Member, Soc. Sec. Advisory Bd.). The SSAB is "a 7-member bipartisan Advisory Board [created] to advise the President, the Congress, and the Commissioner of Social Security on Social Security and Supplemental Security Income . . . policy." "Social Security Advisory Board," <http://www.ssab.gov/AbouttheBoard/AuthorizingStatute.aspx> (last visited July 18, 2013).

<sup>90</sup> *See id.* (statement of Hon. Ronald G. Bernoski, Pres., Ass'n of Admin. Law Judges). Others took this view, including the American Federal of Government Employees Council 215 and the Federal Managers Association.

<sup>91</sup> *See id.* (statement of Richard P. Morris, Pres., Nat'l Org. of Claimants' Rep's).

<sup>92</sup> *See id.*

<sup>93</sup> *See Comm'r of Soc. Sec.'s Proposal to Improve the Disability Determination Process: Joint Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means and Human Res. Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 108th Cong. (2004) (statement of Jo Anne B. Barnhart, Comm'r, Soc. Sec. Admin.), available at [http://www.ssa.gov/legislation/testimony\\_093004.html](http://www.ssa.gov/legislation/testimony_093004.html). Congressman Brady affirmed Commissioner Barnhart's plan as one of reforming the process so that claimants do not "fall through the [safety] net," while also eliminating unnecessary procedural steps. *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *See id.*

decision; and, (3) no appellate body to review an ALJ decision would overwhelm the federal court system with SSA disability benefits cases.<sup>97</sup>

In addition to receiving testimony from the Commissioner, the Subcommittees again heard from a number of organizations.<sup>98</sup> The SSAB suggested that closing the record “may . . . serve to reduce timelines by sharpening the focus on the hearing itself as the final administrative step.”<sup>99</sup> The board stressed the importance of finality, stating that without closure of the record, new evidence could always be submitted, resulting in an ever-changing record.<sup>100</sup> The SSAB, however, also noted that if the agency closed the record, certain evidence should be allowed under a good cause exception.<sup>101</sup> The AALJ continued to support “the concept of closing the record after the ALJ hearing,” but only so long as all material evidence had been included before closure.<sup>102</sup> The union proffered a suggestion for a good cause exception consisting of two tests.<sup>103</sup> One test would relate to evidence that did *not* exist at the time of the hearing, which, in the AALJ’s view, should be automatically admitted.<sup>104</sup> The other test would apply to evidence that *did* exist prior to the hearing, for which, in its view, the claimant would have to provide a good reason for failing to submit earlier.<sup>105</sup>

At the same hearing, the Consortium for Citizens with Disabilities (“CCD”)—a coalition of various organizations that advocates on behalf of people with disabilities—firmly opposed closing the record. While CCD strongly supported submitting evidence as quickly as possible, it stated that certain circumstances made timely submission of evidence impossible.<sup>106</sup> Yet should SSA nonetheless move forward with its record closure plan, CCD advocated for the addition of a good cause exception which would permit claimants to submit new and material evidence into the record during or after the ALJ hearing.<sup>107</sup> CCD also recommended keeping the adjudication process informal so that it would be understandable, especially to laypeople.<sup>108</sup>

### **c. 2005 NPRM: The Disability Service Improvement Program Takes Shape**

Nearly a year and many meetings with “hundreds of interested organizations, groups, and individuals” later,<sup>109</sup> SSA issued a Notice of Proposed Rulemaking (“NPRM”) that proposed

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<sup>97</sup> *See id.*

<sup>98</sup> *See id.*

<sup>99</sup> *Id.* (statement of Hon. Hal Daub, Chairman, Soc. Sec. Advisory Bd.).

<sup>100</sup> *See id.*

<sup>101</sup> *See id.*

<sup>102</sup> *See id.* (statement of Ronald G. Bernoski, Pres., Ass’n of Admin. Law Judges). Others, such as the National Council of Social Security Management Organizations, the National Association of Disability Examiners, and the Federal Managers Association supported closing the record after the ALJ decision. The Federal Bar Association supported a good cause exception.

<sup>103</sup> *See id.*

<sup>104</sup> *See id.*

<sup>105</sup> *See id.*

<sup>106</sup> *See id.*

<sup>107</sup> *See id.*

<sup>108</sup> *See id.*

<sup>109</sup> Soc. Sec. Admin., Administrative Review Process for Adjudicating Initial Disability Claims, 70 Fed. Reg. 43,593 (proposed July 27, 2005) [hereinafter 2005 Proposed Rules]. The people and organizations with whom SSA met included members of Congress and congressional staff, organizations representing the interests of claimants,

several changes to the disability determination process.<sup>110</sup> In the preamble, the agency stated that it expected the changes to “significantly reduce average disability determination processing time, increase decisional consistency and accuracy, and ensure that the right determination or decision [wa]s made as early in the disability determination process as possible.”<sup>111</sup> The agency also stated its belief that the changes would facilitate claimants’ timely submission of evidence, thereby improving the efficiency of the disability determination process.<sup>112</sup>

In this 2005 NPRM, SSA proposed rules that would require claimants to submit evidence no later than 20 days before their scheduled ALJ hearing date.<sup>113</sup> As a twin provision, SSA proposed to extend the timeframe for issuance of the hearing notice to 45 days before the hearing.<sup>114</sup> That way, the agency believed, claimants would have adequate time to collect and submit their evidence by the record closure date.<sup>115</sup> Regarding evidence that was not submitted within the prescribed timeframe, SSA proposed two exceptions that claimants would be required to raise at the hearing:

[1]If [the claimant was] aware of any additional evidence that [he or she] could not timely obtain and submit *or* [2] if [the claimant was] scheduled to undergo additional medical evaluation after the hearing for any impairment that forms the basis of [the] disability claim, [he or she] must inform the [ALJ] of either of these circumstances during [the] hearing.<sup>116</sup>

These exceptions, however, were subject to the ALJ’s discretion.<sup>117</sup> The ALJ could grant the claimant’s request to keep the record open for a defined amount of time.<sup>118</sup> After the evidence was received, the record would close and the decision would be issued.<sup>119</sup>

The 2005 NPRM also provided for submission of new evidence in “very limited situations.”<sup>120</sup> The agency might consider new evidence submitted by the claimant after the record was closed and about which the claimant had not previously informed the ALJ. Such situations would include when a claimant “experience[d] a significant worsening of a condition or . . . the onset of a new impairment after the hearing, but before the decision [wa]s issued.”<sup>121</sup> These situations merited special consideration, according to SSA, because the claimant could not

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beneficiaries, retirees, legal and medical professionals, and SSA and state agency employees involved in the disability determination process. *See id.*

<sup>110</sup> *See id.* at 43,590-43,624.

<sup>111</sup> *Id.* at 43,590.

<sup>112</sup> *See id.*

<sup>113</sup> *See id.* at 43,597. SSA proposed to require that all evidence—both in support of and contrary to a claim—be submitted. *See id.* at 43,602. SSA proposed requiring that all evidence currently available to the claimant be submitted when he or she filed a request for hearing, and that additional evidence be submitted only up until 20 days before the hearing. *See id.*

<sup>114</sup> *See id.* at 43,597.

<sup>115</sup> *See id.*

<sup>116</sup> *Id.* (emphasis added).

<sup>117</sup> *See id.*

<sup>118</sup> *See id.*

<sup>119</sup> *See id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

have known they would occur.<sup>122</sup> This “limited” exception, however, only applied if the claimant sought to submit this evidence no later than 10 days after the issuance of the ALJ decision.<sup>123</sup>

SSA proposed implementing these changes gradually, one region at a time, beginning with one of its smaller regions.<sup>124</sup> It planned to choose a region with the fewest annual court filings so that it could closely monitor the impact on the court system.<sup>125</sup> To implement these new procedures, SSA created a new part—part 405—which applied to both title II and title XVI claims.<sup>126</sup>

#### **d. 2005 Hearing: Discussion of the Disability Service Improvement Program**

A couple of months later, the Subcommittees on Social Security and Human Resources held another joint hearing in order to examine the 2005 NPRM.<sup>127</sup> Commissioner Barnhart, as well as various stakeholders testified about the proposed regulations.

When asked by the Chairman of the Subcommittee on Social Security why the agency proposed time limits for the submission of evidence, Commissioner Barnhart explained that the time requirements were meant to ensure that the ALJ was looking at the most developed record possible so that he or she could make a decision based on the entire record at the hearing.<sup>128</sup> However, the 2005 NPRM allowed for good cause exceptions should evidence need to be admitted later than the regulations required.<sup>129</sup> She emphasized the problems of rescheduling and postponement of hearings—31% of hearings were being postponed. Postponement and rescheduling affected not only the claimant whose hearing was rescheduled or postponed after he or she had waited a substantial amount of time to even get a hearing, but also other claimants who could have had a hearing scheduled in a slot that ended up being unused.<sup>130</sup>

A member of the Subcommittee on Human Resources expressed concern that the process was moving away from a “truth seeking, informal[,] non-adversarial process.”<sup>131</sup> He thought the process should give the claimant every opportunity to prove disability and believed a 20-day limit would create a procedural stumbling block that was diametrically opposed to the goal of the

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<sup>122</sup> *See id.*

<sup>123</sup> *See id.* If the decision was selected by the Decision Review Board (“DRB”)—the appellate body designed to replace the Appeals Council—for review, the claimant must submit the evidence and explanation to that body. *See id.* In addition, SSA “propose[d] to delete new and material evidence as a basis for finding good cause to reopen” a claim. *Id.* at 43,603. Further, if the only reason for requesting reopening is the submission of evidence that had not been previously provided, SSA would decline to reopen the claim. *See id.*

<sup>124</sup> *See id.* at 43,599.

<sup>125</sup> *See id.* at 43,600.

<sup>126</sup> *See id.* For a comparison between the 2005 NPRM and today’s regulations as they exist today, see APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, at App. B pp. A-4 & A-5.

<sup>127</sup> *See Comm’r of Soc. Sec.’s Proposed Improvements to the Disability Determination Process: Joint Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means and Human Res. Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 109th Cong. (Sept. 27, 2005).

<sup>128</sup> *See id.* (testimony of Jo Anne Barnhart, Comm’r of Soc. Sec. Admin.).

<sup>129</sup> *See id.*

<sup>130</sup> *See id.*

<sup>131</sup> *Id.* (statement by Xavier Becerra, Rep., California).



program.<sup>132</sup> The Commissioner assured him that the goal was not to close the record prior to the ALJ hearing, but rather after issuance of the ALJ decision.<sup>133</sup>

CCD reiterated its concern that the proposed good cause exceptions were insufficient to prevent unfair and unjust decisions, which could lead to resolution of claims on the basis of technicalities rather than truth.<sup>134</sup> CCD also highlighted what it believed were three incorrect underlying assumptions: (1) “the claimant or representative ha[d] control over the sources of medical or vocational evidence;” (2) the “claimant [wa]s represented from the beginning of the process;” and (3) “diagnosis [wa]s simple and straightforward.”<sup>135</sup> The organization stated that reality was quite different. It noted that a claimant or representative could face great difficulty in obtaining evidence.<sup>136</sup> In addition, the organization stated that the claimant often did not retain representation until late in the process.<sup>137</sup> Finally, it said that medical conditions were often challenging to diagnose.<sup>138</sup> CCD believed it was wrong to deny a person benefits simply because he or she did not comply with such stringent procedural limitations as the 2005 NPRM would impose.<sup>139</sup>

While NOSSCR recognized the difficulties ALJs faced when they received evidence just prior to or at the hearing, calling it detrimental to the ALJ’s “ability to be educated about the medical record . . . and mak[ing] the hearing less effective,”<sup>140</sup> the organization, like CCD, opposed certain provisions in the 2005 NPRM.<sup>141</sup> NOSSCR maintained that requiring evidence 20 days before the hearing, subject to a good cause exception was actually in contravention of the statutory requirement that decisions be made based on “evidence adduced at the hearing.”<sup>142</sup> NOSSCR pointed to the difficulty in obtaining medical records, explaining that while the regulations would give claimants or representatives only 25 days to marshal the

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<sup>132</sup> *See id.*

<sup>133</sup> *See id.* (testimony of Jo Anne Barnhart, Comm’r of Soc. Sec. Admin.).

<sup>134</sup> *See id.* (statement of Marty Ford, Co-Chair, Soc. Sec. Task Force, Consortium of Citizens with Disabilities) [hereinafter *Ford 2005 Statement*].

<sup>135</sup> *See id.*; *see also* Letter from Marcie E. Goldbloom, Daley, DeBofsky & Bryant, to Jo Anne Barnhart, Comm’r, Soc. Sec. Admin. (Oct. 19, 2005) (on file with authors) (stating that she often represented claimants who obtained her services less than a full month before the hearing, and most of the cases required record development).

<sup>136</sup> *See Ford 2005 Statement, supra* note 134; *see also* Comments on 2005 NPRM submitted by Kathleen Flaherty, Rose Bonaduce, Timothy Hornbecker, & Colleen Graney (Oct. 14 & 15, 2005) (expressing concern that claimants and representatives lack control over when they will receive evidence from medical providers) [hereinafter *Flaherty, et. al. Comments*].

<sup>137</sup> *See Ford 2005 Statement, supra* note 134; *see also* Flaherty, et. al. Comments, *supra* note 136 (noting that claimants are not often represented until later in the process)

<sup>138</sup> *See Ford 2005 Statement, supra* note 134.

<sup>139</sup> *See id.*

<sup>140</sup> *Id.* (testimony of Thomas D. Sutton, Pres., Nat’l Org. of Soc. Sec. Claimants’ Rep’s).

<sup>141</sup> *See id.*

<sup>142</sup> *Id.* CCD agreed that the 20-day requirement may violate the statute. *See Ford 2005 Statement, supra* note 134.

evidence<sup>143</sup> (45 day notice minus 20-day prior-to-hearing submission deadline), nothing required medical providers to produce the evidence timely.<sup>144</sup>

**e. 2006 Final Rule: Disability Service Improvement Program Implemented**

About six months after the hearing to discuss its 2005 NPRM, SSA issued final rules establishing the Disability Service improvement (“DSI”) program, which was intended “to improve the accuracy, consistency, and fairness of [the agency’s] disability determination process and to make the right decision as early in the process as possible.”<sup>145</sup> The final rule issued by SSA was different than the proposed rule in a number of ways, as shown below:<sup>146</sup>

**Table 2: Comparison of Proposed & Final DSI Program Rule (2005-06)**

	2005 Proposed Rule	2006 Final Rule
<b>Evidence Submission Deadline</b>	No later than 20 (calendar) <sup>147</sup> days before the hearing date	No later than 5 business days before the hearing date
<b>Notice of Hearing Requirement</b>	At least 45 days before the hearing date	At least 75 days before the hearing date

As a result of these new regulations, “[t]he record . . . closed after the [ALJ] issue[d] a decision, with provision for good cause exceptions to this rule.”<sup>148</sup>

By revising its 2005 NPRM, SSA stated that receiving “new and voluminous medical evidence” just prior to or at the hearing did not allow the ALJ adequate time “to review and consider that evidence.”<sup>149</sup> This, in turn, often caused the hearing to be postponed, which delayed both this and other claimants’ hearings and decisions.<sup>150</sup> Moreover, the medical and vocational experts likewise will have had scant time to review and prepare.<sup>151</sup> Simultaneously, SSA recognized the claimant’s need for timely notification of the hearing in order to collect medical evidence. The agency therefore committed to providing notice of hearing 75 days in advance of the hearing date, and set 90-day notice of hearing as an administrative goal.<sup>152</sup>

<sup>143</sup> Some firms have staff dedicated solely to developing clients’ records, including issuing requests for records, following up with phone calls and faxes, and reviewing submissions to ensure that they are complete. *See id.* (statement of Thomas D. Sutton, Pres., Nat’l Org. of Soc. Sec. Claimants’ Rep’s).

<sup>144</sup> As ways to compel medical providers to produce records, NOSSCR recommended providing adequate reimbursement rates, contacting providers repeatedly for the records, and issuing subpoenas for the production of records. *See id.*

<sup>145</sup> 2006 Final Rule, *supra* note 9, at 16,424.

<sup>146</sup> *See id.* at 16,428.

<sup>147</sup> The 2005 NPRM defined “day” as “calendar day, unless otherwise indicated.” 2005 Proposed Rules, *supra* note 109, at 43,610.

<sup>148</sup> 2006 Final Rule, *supra* note 9, at 16,428.

<sup>149</sup> *Id.* at 16,434.

<sup>150</sup> *See id.*

<sup>151</sup> *See id.*

<sup>152</sup> *See id.*

The ALJ continued to “retain discretion at the time of the hearing to hold the record open for the submission of additional evidence.”<sup>153</sup> Though not required, the regulations encouraged the claimant to inform the ALJ of any additional evidence, evaluations, or procedures he or she was aware of so that the ALJ could decide whether to hold the record open.<sup>154</sup> After he or she received the evidence, the ALJ would “close the record and issue a decision.”<sup>155</sup>

The record was considered closed when the ALJ issued his or her decision.<sup>156</sup> The Decision Review Board (“DRB”)—the entity designed to replace the Appeals Council—would only review evidence that was before the ALJ.<sup>157</sup> If the DRB found that further record development was necessary, it would remand the case to the ALJ.<sup>158</sup>

Finally, SSA announced that it would begin to implement these and other changes first in Region I, one of its smallest regions.<sup>159</sup> By gradually implementing the changes, SSA hoped to monitor the effects of the new rules and apply lessons learned to the program’s implementation in other regions.<sup>160</sup> SSA did not anticipate introducing the changes to another region for one year in order to have adequate time to assess the implementation and resolve any issues.<sup>161</sup>

#### **f. 2006 Hearing: Assessment of DSI and Plan for Nationwide Implementation**

About three months after the final rules were issued, the Subcommittee on Social Security held another hearing in order to learn how the Commissioner planned to implement DSI.<sup>162</sup> The Commissioner stated that the regulations would apply to claims filed on or before August 1, 2006 and only in states where such regulations had been implemented.<sup>163</sup> Commissioner Barnhart also noted that the DRB would review 100% of ALJ decisions in order both to respond to commenters who were concerned that erroneous denials would not be reviewed, and “to design, test, and validate a predictive model for selecting a subset of all ALJ decisions for DRB review that include those most likely to be remanded by the U.S. District Courts.”<sup>164</sup>

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<sup>153</sup> *Id.* at 16,435.

<sup>154</sup> *See id.*

<sup>155</sup> *Id.* at 16,434.

<sup>156</sup> *See id.* at 16,456.

<sup>157</sup> *See id.*

<sup>158</sup> *See id.*

<sup>159</sup> *See id.* at 16,440. Region I was chosen because of its size and proximity to headquarters. *See* In-person interview with senior Office of Disability Adjudication and Review (“ODAR”) official (Jan. 28, 2013) (interview notes on file with authors) [hereinafter Senior ODAR Official Interview]. The Region VIII (also known as the “Denver Region”) is similar in size, but was farther away from headquarters. *See id.*

<sup>160</sup> *See* 2006 Final Rule, *supra* note 9, at 16,440.

<sup>161</sup> *See id.* at 16,441.

<sup>162</sup> *See Soc. Sec.’s Improved Disability Determination Process: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 109th Cong. (2006) (statement of Jo Anne Barnhart, Comm’r, Soc. Sec. Admin.), available at [http://www.ssa.gov/legislation/testimony\\_061506.html](http://www.ssa.gov/legislation/testimony_061506.html).

<sup>163</sup> *See id.*

<sup>164</sup> *Id.* (statement of Jo Anne Barnhart, Comm’r, Soc. Sec. Admin.). Originally, SSA intended to identify the most error-prone cases through a predictive model. *See* Senior ODAR Official Interview, *supra* note 159. The company SSA had been working with to create such a model misrepresented its ability to do so. *See* Senior ODAR Official

Ultimately, the 75-day notice requirement and the five-day rule were meant to balance protection of the claimant's interests with administrative efficiency.<sup>165</sup> It was thought that 75 days would be adequate time to collect and submit evidence and five days would allow for administrative processing and review by experts.<sup>166</sup> The agency wanted to tighten up the system while acting fairly toward claimants by acknowledging circumstances in which he or she could not avoid submitting evidence later than the regulations generally required.<sup>167</sup> Although SSA intended to implement these and other changes nationwide, DSI would never be nationally implemented and in fact would be (mostly) repealed in a few short years.

## **2. Elimination of Most Aspects of DSI Leads to the Current Pilot Program**

SSA was pleasantly surprised how few—especially among the representative community—expressed concern about the new procedures in Region I.<sup>168</sup> DSI appeared to be more successful than expected, in all but one, albeit significant, respect.<sup>169</sup> SSA's Office of the General Counsel and the federal courts were displeased with DRB review. The regulations stated that a case would be certified to district court if the DRB did not review it within 90 days of the ALJ's decision.<sup>170</sup> The courts experienced a marked increase in case filings because the DRB lacked the resources to review every ALJ decision, as it had committed to do.<sup>171</sup> Within a couple of months, cases began to pile up and the DRB started reviewing only unfavorable and partially favorable decisions.<sup>172</sup> It became more and more common that the DRB would not be able to review a case at all and would simply certify it to federal court.<sup>173</sup> The inability of the DRB to function as envisioned was a significant contributor to the eventual elimination of DSI.

### **a. 2007 NPRM: Proposal to Implement DSI Nationally**

It was in this context—six months after DSI was launched—that Michael Astrue began his term as the new Commissioner of SSA.<sup>174</sup> Within the first year of his six-year term, SSA issued a NPRM that proposed a number of changes—both to Region I, and to the rest of the

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Interview, *supra* note 159. Once SSA discovered that predictive modeling was not possible at that time, the company disappeared. *See id.* SSA is getting closer to being able to conduct “text mining.” *Id.*

<sup>165</sup> *See* Senior ODAR Official Interview, *supra* note 159; *see also* In-person interview with Administrative Appeals Judge (“AAJ”) (Jan. 28, 2013) (interview notes on file with authors) [hereinafter AAJ Interview].

<sup>166</sup> *See* Senior ODAR Official Interview, *supra* note 159.

<sup>167</sup> *See id.*; *see also* In-person interview with former senior Office of Appellate Operations (“OAO”) official (Jan. 28, 2013) (interview notes on file with authors).

<sup>168</sup> *See* Senior ODAR Official Interview, *supra* note 159; *see also* AAJ Interview, *supra* note 165.

<sup>169</sup> *See* in-person interview with senior Appeals Council official (Jan. 28, 2013) (interview notes on file with authors) [hereinafter Senior Appeals Council Official Interview]. But for the bottleneck of the DRB, the system worked well—the flow of evidence was not the problem, lack of resources was the problem. *See* AAJ Jan. 29 Interview, *supra* note 240.

<sup>170</sup> *See* Senior ODAR Official Interview, *supra* note 159.

<sup>171</sup> *See id.*

<sup>172</sup> *See* Senior Appeals Council Official Interview, *supra* note 169.

<sup>173</sup> *See id.*

<sup>174</sup> *See* Soc. Sec. Admin., *Social Security Commissioners: Michael Astrue*, <http://www.ssa.gov/pressoffice/factsheets/astrue.htm> (last visited June 26, 2013).

country.<sup>175</sup> In it, SSA proposed to implement the changes made at the hearing level nationwide and to remake the DRB and Appeals Council into a “Review Board.”<sup>176</sup>

The 2007 NPRM proposed to apply Region I’s notice requirement and evidence submission rules nationwide. SSA gave the same reasons for nationwide implementation as it had for Region I implementation. In order to give claimants enough time to submit evidence, SSA proposed notifying the claimant of the hearing date at least 75 days in advance.<sup>177</sup> This consideration was balanced by the need for ALJs and others (i.e., vocational and/or medical experts) to have time to thoroughly prepare for the hearing, hence the five-day rule.<sup>178</sup> The five-day rule would include the same good cause exceptions that existed in Region I.<sup>179</sup>

These proposed regulatory changes proved to be unexpectedly controversial. A substantial amount of backlash erupted from both congressmen and representative organizations in response to the 2007 NPRM.<sup>180</sup> A number of committee and subcommittee chairmen wrote a letter to Commissioner Astrue.<sup>181</sup> They expressed support for certain aspects of the 2007 NPRM, such as the 75-day hearing notice, but took issue with other aspects, especially aspects they interpreted as being unfair, preventing all evidence from being considered, and promoting efficiency “over a full and fair consideration of the claim.”<sup>182</sup> They remarked that the backlog was not due to a failure in the appeals process, but rather because of underfunding.<sup>183</sup> NOSSCR and CCD reiterated their prior objections to DSI both through a letter writing campaign, and in face-to-face meetings with agency officials.<sup>184</sup>

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<sup>175</sup> See 2007 Proposed Rules, *supra* note 9, at 61,218-45.

<sup>176</sup> See *id.* at 61,219. The primary issue with the DRB involved a failure to design a predictive model that would identify those cases with the most problems. See *id.* Moreover, the DRB was tasked with reviewing 100% of cases, which could not be sustained on a regional, much less a nationwide basis. See *id.*

<sup>177</sup> See *id.*

<sup>178</sup> See *id.*

<sup>179</sup> See *id.* One change to both Region I and the rest of the nation involved holding the record open. SSA proposed to formalize the practice of keeping the record open by enshrining that practice in regulations. Under these new regulations, the ALJ would still be able to hold the record open should the claimant inform the ALJ of any evidence he or she anticipates receiving or if he or she was scheduled to undergo further evaluation post-hearing. See *id.* at 61,220. The ALJ would keep the record open for a specific time period to allow for the submission of further evidence, after which the record would close and the decision would be issued. See *id.* The ALJ could also choose to hold a supplementary hearing, if he or she thought it best. See *id.*

<sup>180</sup> See In-person interview with Appeals Council official (Jan. 28, 2013) (interview notes on file with authors).

<sup>181</sup> See Letter from John D. Dingell, Chairman, H. Comm. on Energy & Commerce, et. al., to Michael J. Astrue, Comm’r, Soc. Sec. Admin. (Dec. 20, 2007) (on file with authors) [hereinafter Dingell, et. al. Letter]. Signees included the House Chairmen of the Committees on Energy and Commerce, Judiciary, Ways and Means, and Oversight and Government Reform, as well as House Chairman of the Subcommittees on Health (Ways and Means), Courts, the Internet, and Intellectual Property (Judiciary), Oversight (Ways and Means), Health (Energy and Commerce), Income Security and Family Support (Ways and Means), Social Security (Ways and Means), and Commercial and Administrative Law (Judiciary). See *id.* Members of the Senate Committee on Finance also sent a letter to Commissioner Astrue noting their concerns, among which was closing the record. See Letter from Max Baucus, Chairman, S. Comm. on Finance, et. al., to Michael J. Astrue, Comm’r, Soc. Sec. Admin. (Jan. 24, 2008) (on file with authors).

<sup>182</sup> Dingell, et. al. Letter, *supra* note 189.

<sup>183</sup> See *id.*

<sup>184</sup> See Letter from Nancy G. Shor, Exec. Dir., Nat’l Org. of Soc. Sec. Claimant’s Rep’s, to Michael J. Astrue, Comm’r, Soc. Sec. Admin. (Dec. 18, 2007) (on file with authors); In-person meeting between SSA senior officials

## **b. 2009 NPRM: Proposed Elimination of the DSI Program**

Due to the vast number of comments the agency received, as well as “increasing workloads, lengthening hearing backlogs, and diminishing resources,”<sup>185</sup> SSA decided to reevaluate its 2007 NPRM.<sup>186</sup> Instead of applying Region I’s regulations nationwide, SSA proposed bringing Region I’s practices in line with the rest of the nation by “remov[ing] all remaining DSI rules and us[ing] the same rules for adjudication in [R]egion [I] as [it] use[d] in the rest of the country.”<sup>187</sup> The proposed rules would eliminate the DRB, the 75-day notice requirement, and the five-day rule.<sup>188</sup>

## **c. 2011 Final Rule: Some Aspects of DSI Remain in Region I**

About a year and a half later, SSA issued final rules with respect to Region I.<sup>189</sup> The agency explained that it was adopting some, though not all, of the changes it proposed in its 2009 NPRM.<sup>190</sup> It eliminated the DRB, which reestablished the Appeals Council as the appellate body in Region I.<sup>191</sup> The final rules left the 75-day notice requirement and five-day rule intact.<sup>192</sup> The current pilot program, then, is but the vestige of DSI. The history of ambivalent support for the program may help explain the dichotomy between agency perspectives on the program and how the program works in practice.<sup>193</sup>

## **III. ASSESSMENT OF THE IMPACT OF SSA’S PILOT PROGRAM IN REGION I**

To assess the impact of SSA’s Region I pilot program, we analyzed statistical data provided by SSA, interviewed SSA ALJs, staff members and other agency officials, conducted a national survey of ALJs and HODs, solicited the views of several judicial and legal organizations with an interest in the SSA disability adjudication process through written questions and follow-

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and NOSSCR representatives (Jan. 17, 2008) (notes on file with authors); In-person meeting between SSA senior officials and NOSSCR and CCD representatives (Feb. 7, 2008) (notes on file with authors).

<sup>185</sup> Soc. Sec. Admin., Reestablishing Uniform National Disability Adjudication Provisions, 74 Fed. Reg. 63,688 (proposed Dec. 4, 2009).

<sup>186</sup> *See id.* at 63,688-94.

<sup>187</sup> *See id.* at 63,689.

<sup>188</sup> *See id.* at 63,690.

<sup>189</sup> *See* Soc. Sec. Admin., Eliminating the Decision Review Board, 76 Fed. Reg. 24,802-12 (May 3, 2011). Interestingly, SSA only received comments from six individuals and organizations in response to its 2009 NPRM. *See id.* at 24,803. Although the commenters generally supported the proposal, they expressed a handful of concerns, only one of which is relevant to this study. *See id.* They asked SSA to extend the 75-day notice of hearing requirement nationwide. *See id.* SSA declined to accept the comment because it was outside the purview of the 2009 NPRM, which proposed only changes to Part 405 (Region I), not changes to Parts 404 and 416 (all other regions). *See id.* at 24, 804.

<sup>190</sup> *See id.* 24,802.

<sup>191</sup> *See id.* Due to different practices at the ALJ level, certain regulations governing the Appeals Council review in Region I, such as the consideration of evidence submitted after the hearing decision, would be different than those that are in effect for the rest of the country. *See id.*

<sup>192</sup> It also left both the reopening provisions and the heightened standards required for admittance of evidence to the Appeals Council intact.

<sup>193</sup> This dichotomy is discussed in detail *infra* Pt. III.B.

up interviews, and examined judicial decisions concerning the pilot program’s five-day rule.<sup>194</sup> This part summarizes the results from these sources.

### **A. Empirical Analysis of SSA Data: Comparing the Regions**

Our empirical analysis of the impact of the pilot program focused on a comparative approach that assessed SSA-provided data for Regions I, VII, and VIII, as well the nation as a whole, along several key variables, such as case processing efficiency, remand rates, and timing and volume of evidentiary submissions. In sum, our analyses of SSA data showed that the pilot program, as currently implemented in Region I, appears to be making modest strides toward advancing the goals set forth by SSA at its inception—namely, improving the efficiency, accuracy, and timeliness of the Social Security disability benefits adjudication process. Complete descriptions of our methodology, empirical analyses, and results are set forth in Appendix D of the accompanying *Appendix to Report on Region I Pilot Program*, and a summary follows below.

Before summarizing the results of our empirical analyses, two initial matters warrant discussion. First, for this study, data were provided to the Conference by SSA from the agency’s Case Processing Management System (“CPMS”) and the Appeals Council Review Processing System (“ARPS”) information data tables,<sup>195</sup> as well as eView, and the Standard Data Repository (“SDR”).<sup>196</sup> Staff both in the Office of Electronic Services and Strategic Information, Division of Management Information and Analysis and detailed to the Appeals Council computed some of the variables that were not available directly from these tables. While CPMS, ARPS, eView, and SDR represented the best available data sources, and offer a window into certain aspects of the pilot program (e.g., issuance of hearing notices and evidentiary submission), they are national case and information management databases that do not capture a number of variables uniquely specific to the Region I pilot program (e.g., frequency and disposition of requests for good cause exceptions). Given these limitations, the data studied herein—while reliable—are not sufficiently tailored to serve as the basis for definitive, empirically based conclusions about the impact of the pilot program, or to establish causal relationships between the pilot program and particular analytical results.<sup>197</sup> What the comparative results do suggest, however, is that there are some potential areas where the pilot program is having its intended effect (while not having any decidedly negative effect—at least insofar as measured by our limited data set).

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<sup>194</sup> For a more detailed description of the assessment methods used in this report, see APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, at App. A, pp. A-1 to A-3.

<sup>195</sup> Adjudicators and other agency employees at both the ALJ hearing level and Appeals Council level use electronic case management systems to help manage their workflow and provide case-related management information. The current system in use at the hearing level is CPMS, while at the Appeals Council level ARPS is used. Not only do adjudicators and other staff members use CPMS and ARPS in their day-to-day work, but the agency also uses data from these systems to identify and address trends and anomalies existing at the various levels of agency adjudication.

<sup>196</sup> The electronic folder is essentially “an electronic version of a . . . disability claim file [where, among other things,] all of the medical evidence, correspondence, [and] decisions . . . are stored.” See E-mail from Maren Weight, Appeals Officer, Soc. Sec. Admin., to Amber Williams, Att’y Advisor, Admin. Conference of the U.S. (Dec. 18, 2013) (on file with authors). “eView is the mechanism through which all agency employees view the electronic folder[, while SDR] is the structured format of all the information contained in the electronic folder.” *Id.*

<sup>197</sup> See, e.g., APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, at A-13, A-15, A-16, A-18, A-21, A-22, A-26, A-29, A-31, A-32 & A-33.

Second, to facilitate assessment of the pilot program in Region I, we elected to use a comparative approach that assessed data from Region I relative to two other SSA regions (Regions VII and VIII), as well as nationally across all SSA regions. While no comparison is perfect in such a large adjudication system, Regions I, VII, and VIII share several defining characteristics that make comparison useful. These regions each have a relatively similar number of hearing offices,<sup>198</sup> ALJs,<sup>199</sup> and annual dispositions.<sup>200</sup> Also, each region has one prototype state (i.e., Region I: New Hampshire; Region VII: Missouri; and Region VIII: Colorado).<sup>201</sup> We compared these regions—along with national averages—across the same key variables relating to case processing times, record development, decisional quality (as measured by remand frequency percentages), volume and timeliness of evidentiary submissions, and time intervals between issuance of the notice of hearing and the hearing date. Notable findings from these comparative empirical analyses are highlighted below.

*Record Development.* To assess the impact of the pilot program on record development, we examined the relative frequency with which ALJs ordered CEs in Region I relative to other regions. ALJs order CEs when “the claimant does not provide adequate evidence about his or her impairment(s).”<sup>202</sup> One may assume that CEs are needed more often in cases where records have not been adequately developed. It is thus noteworthy that the data show that, from calendar years (“CYs”) 2010 – 2012, Region I had the lowest percentage of cases for which a CE was ordered relative to either Regions VII or VIII, or the national average.<sup>203</sup> This result may suggest that the Region I pilot program does—as SSA hoped—promote record development. However, firm conclusions cannot be drawn (or causal connections made) absent data that are more sensitive to potentially confounding factors, such as variations across regions (and nationally) in diseases or impairments, access to medical care, record development at the DDS level, and quality of representation.

We also evaluated SSA data relating to the comparative frequencies at which ALJs in Regions I, VII, and VIII (and, collectively, across all regions) left records open after hearings—often referred to as “putting a case into post”—to assess the impact of the pilot program on post-hearing record development. The analyses failed to demonstrate a correlation (either positive or

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<sup>198</sup> These regions’ respective hearing office totals are as follows: Region I (8); Region VII (9); and, Region VIII (5 and 4 satellite offices). See E-mail from Rainbow Forbes, Appeals Officer, Soc. Sec. Admin., to Amber Williams, Att’y Advisor, Admin. Conference of the U.S. (June 7, 2013) (on file with authors).

<sup>199</sup> Current number of ALJs by region are: Region I (57); Region VII (72); and Region VIII (37). *Id.*

<sup>200</sup> In FY 2012, these regions had 32,174 (Region I), 35,329 (Region VII), and 20,885 (Region VIII) dispositions respectively. See APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, at App. D, tbl. A-1, p. A-11 (annual dispositions by region).

<sup>201</sup> Prototype states are states in which the reconsideration level has been eliminated. Soc. Sec. Admin., *POMS § DI 12015.100-Disability Redesign Prototype Model* (Feb. 13, 2012), <https://secure.ssa.gov/poms.nsf/lnx/0412015100> (last visited May 23, 2013). After the initial determination, an appealed case is sent to ODAR for a hearing. See *id.* The prototype states are: Alabama, Alaska, California (Los Angeles North and West branches only), Colorado, Louisiana, Michigan, Missouri, New Hampshire, New York, and Pennsylvania—one from each region. See *id.*

<sup>202</sup> Soc. Sec. Admin., HALLEX I-2-5-20-Consultative Examinations and Tests (Sept. 28, 2005), available at [http://www.ssa.gov/OP\\_Home/hallex/I-02/I-2-5-20.html](http://www.ssa.gov/OP_Home/hallex/I-02/I-2-5-20.html) (describing when and how to request a CE). The CE should only include those test(s) the ALJ requires to make his or her decision. See *id.*

<sup>203</sup> See APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, at App. D, tbl. A-3 & fig. A-3, pp. A-13 & A-14.



negative) between the pilot program and the percentage of cases placed in post-hearing status.<sup>204</sup> Given data constraints, it cannot be known at this time whether this finding stems from lack of data tailored to the pilot program, its current implementation in Region I, or both.

*Case Processing Efficiency.* A second key area of data analysis centered on the question of whether the pilot program has had any effect on the efficiency of case processing in Region I relative to other regions. To that end, we first analyzed comparative average processing times for cases at the ALJ hearing level (i.e., the time interval between the filing of a request for an ALJ hearing and issuance of an ALJ decision). This study showed that, over the five-year period from FY 2008 to FY 2012, Region I's annual average case processing times were generally lower than those of its sister regions or the nation as a whole.<sup>205</sup> Nonetheless, it is difficult to draw conclusions from this finding because (1) average case processing times generally declined across all regions in this timeframe, and (2) Region I's average processing times did not exhibit the same comparatively steady decline, as did those of the other two regions and the nation.<sup>206</sup>

We also explored whether implementation of the pilot program correlated with a reduction in the number of cases pending relative to annual caseloads (as measured by total number of dispositions annually) over this same five-year period. By evaluating this pending:disposition ratio, we aimed to minimize the influence of differentials in inter-regional (and national) caseloads in order to better isolate the impact of the pilot program on case processing. With the exception of one year (FY 2009), Region I's pending:disposition ratio exhibited a consistent downward trend that was unmatched by the other regions or nationally. Indeed, in FYs 2011 and 2012, Region I exhibits the lowest pending:disposition ratio. This trend suggests a correlation between enhanced case processing efficiency and the pilot program. Additional data would be needed, however, to determine whether the pilot program was the causal factor (or one of the causal factors) in this observed result.

*Remand Rates on Certain Evidentiary Issues.* The third key area we studied from an empirical perspective involved assessment of whether the pilot program affected the comparative frequency with which the Appeals Council remanded cases based on certain evidentiary issues relevant to the five-day rule.<sup>207</sup> SSA tracks the reasons for remands from the Appeals Council based on remand codes that are entered into its case management databases.<sup>208</sup> Each remanded case may be coded for up to three remand reasons, and the agency analyzes the frequency for each remand category—what we refer to as the “frequency rate” or “frequency percentage.” Two of the coded remand categories—“new evidence” and “inadequate record development”—were studied because they are particularly salient to implementation of the five-day rule. The “new evidence” code means that the case was remanded due to evidence the claimant submitted

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<sup>204</sup> See *id.* at App. D, tbl. A-4 & fig. A-4, tbl. A-5 & fig. A-5, pp. A-14 to A-16.

<sup>205</sup> See *id.* at App. D, tbl. A-6 & fig. A-6, p. A-17.

<sup>206</sup> See *id.*

<sup>207</sup> SSA also provided the Conference with data concerning the rates at which federal courts have remanded cases back to the agency based on (1) new evidence presented at either the administrative appeal or federal court levels, as well as (2) inadequate record development. However, the number of times federal courts remanded cases based on claims originating in Regions I, VII, and VIII respectively on these grounds were so small—that is, generally numbering in the single digits annually—that reliable analysis could not be conducted.

<sup>208</sup> See APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, App. D at A-19 (discussing remand coding and tracking).

on appeal, while the “inadequate record development” code means that the record did not have enough information to support the decision that was made. If the pilot program either fails to provide adequate opportunity for evidence submission or prematurely closes the record, one would assume that Region I would have higher remand frequency rates for “new evidence” and/or “inadequate record development” relative to other regions.

Analysis of the SSA data, which covered FY 2008 to FY 2012, did not suggest that the pilot program was adversely affecting record development in Region I claims. That is, the comparative data generally did not evidence an uptick in remand frequency percentages for either “new evidence” or “inadequate record development” in cases originating from Region I as compared to other regions.<sup>209</sup> Region I’s remand frequency rates for these two categories of Appeals Council remands were lower than in Regions VII and VIII, as well as the national average.<sup>210</sup> These results indicate a modest correlation—though not necessarily causation—between the pilot program and lower Appeals Council remand frequency rates for “new evidence” or “inadequate record development.”

*Volume and Timing of Evidentiary Submissions Relative to Hearing Dates.* The fourth key area of empirical inquiry concerned both the volume and timing of evidentiary submissions relative to hearing dates. Our data analyses in this area were aimed most particularly at evaluating the impact of the five-day rule, though the 75-day notice requirement also plays a role in timely submissions. We assessed the trends in each region, as well as nationally, for CYs 2010 – 2012.

For this set of analyses, SSA compiled data that was not otherwise directly available from the agency’s case management systems bearing on the timing, as well as volume, of evidentiary submissions by claimants (or their representatives) relative to hearing dates.<sup>211</sup> More specifically, for CYs 2010 – 12, these data provided the total annual number of documents submitted in each region (and nationally) for all cases in which hearings were conducted. These annual document totals by region were then broken down into fourteen separate time interval categories capturing document filing dates relative to their respective hearing, starting from 1,000 or more days before the hearing to the hearing date and afterward (with this latter time category referred to as “hearing+”).<sup>212</sup>

We found that Regions VII and VIII, as well as the nation, exhibited remarkably similar document submission/timing profiles in CYs 2010 – 12.<sup>213</sup> Focusing on the time intervals most

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<sup>209</sup> See *id.* at App. D, tbl. A-9 & fig. A-9, tbl. A-10 & fig. A-10, pp. A-21 to A-23.

<sup>210</sup> See *id.*

<sup>211</sup> See *id.* at App. D, pp. A-9 to A-10 & A-23 (discussing SSA’s case management systems).

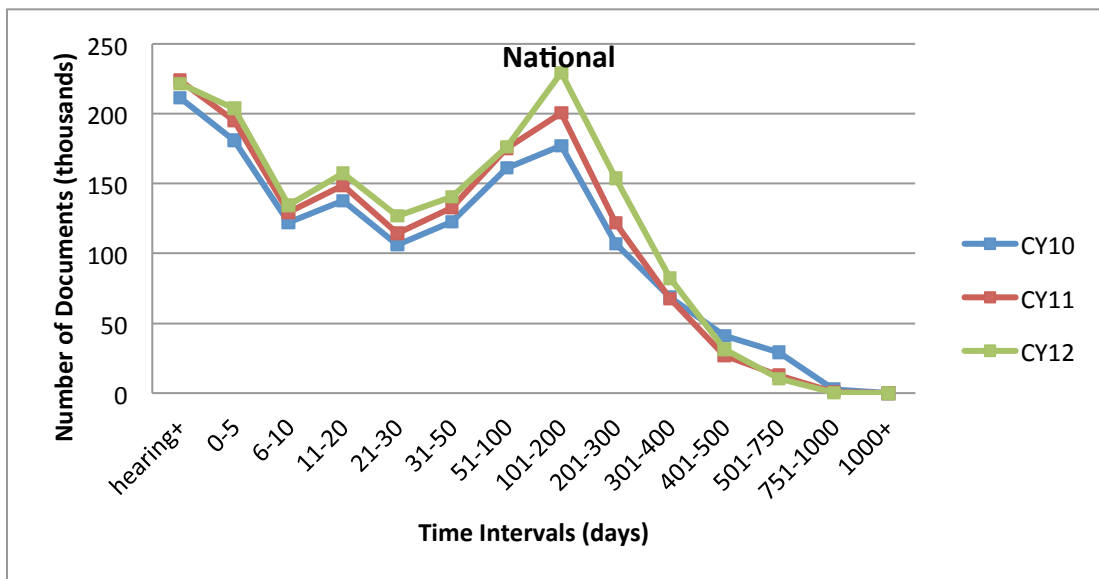
<sup>212</sup> For this data set compiled by SSA, a “document” connotes a unit of written information filed by claimants or representatives, regardless of the number of pages. Thus, a “document” could be a copy of a 100-page medial report or a one-page letter. Moreover, this SSA-provided data concerned only the *quantity* of documents filed in each region annually; it did not provide any *qualitative* information about the relevance or materiality of any submitted documents. With respect to time interval categories, the fourteen categories designated by SSA were (in days): hearing+; 0-5; 6-10; 11-20; 21-30; 31-50; 51-100; 101-200; 201-300; 301-400; 401-500; 501-700; 751-1000; 1000+.

<sup>213</sup> See APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, at App. D, figs. A-11, A-12 & A-13, pp. A-24 to A-25; see also *id.* at App. D, pp. A-27 to A-31 (discussing similar results for additional analyses relating to the timing and volume of document submissions).

relevant to assessment of the pilot program (i.e., 100 days or less before the hearing to hearing+), each of the regions (and the nation) show similar patterns as follows: (1) a downward trend in document submissions from 51-100 days to a trough at 21-30 days; (2) followed by a slight upswing in document submissions between the 21-30 and 11-20 day intervals; (3) followed by a downturn in document submissions between the 11-20 and 6-10 day intervals; and (4) ending in a significant increase in document filings from 6-10 days out from the hearing to the hearing+ interval category.<sup>214</sup> In order words, in Regions VII and VIII and nationally, the bulk of documents submitted in the 30-day period leading up to the hearing (or at or after the hearing), are submitted in the narrow window of time within five or less days for the hearing, at the hearing, or after the hearing.

For example, Figure 1 below graphically depicts, for the nation as a whole, the total number of documents filed annually relative to each of the fourteen time interval categories.

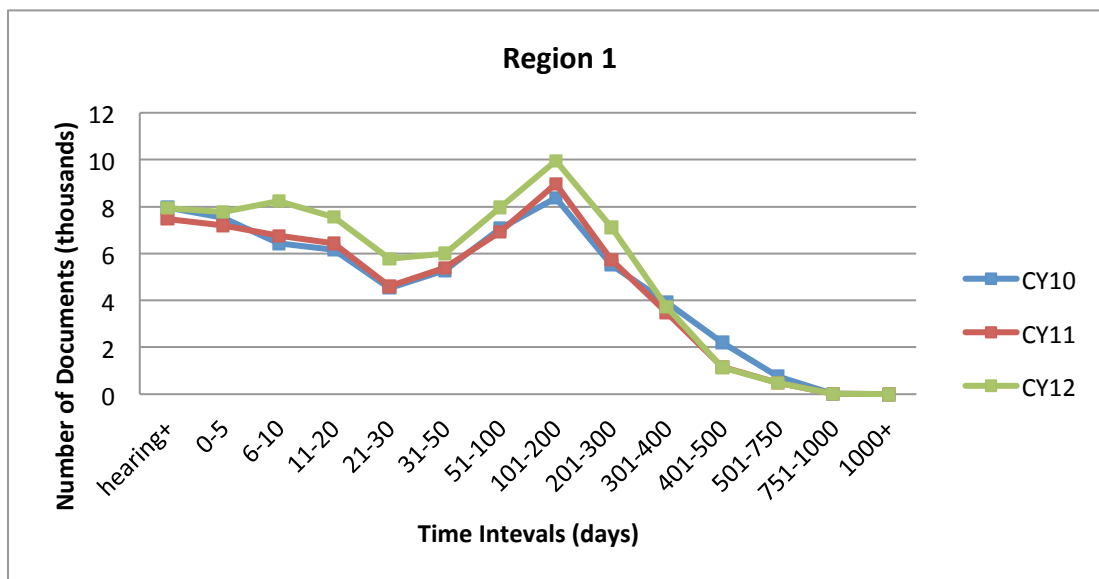
**Figure 1: Number & Timing of Document Submissions Nationally, CYs 2010-12**



Turning to Region I, the results for CYs 2010 – 2012 evidenced both similarities to, and significant departures from, the document submission/timing profiles of its sister regions and the nation as a whole. Set forth below in Figure 2 are the data for Region I with respect to total number of documents filed annually for this three-year time period relative to each of the fourteen time interval categories.

<sup>214</sup> See *id.* at App. D, figs. A-11, A-12 & A-13, pp. A-24 to A-25.

**Figure 2: Number & Timing of Document Submissions in Region 1, CYs 2010-12**



As evidenced by this figure, in the time periods farther out from the hearing (i.e., from 1,000+ to 30 days before the hearing), the volume and timing of document submissions in Region I exhibit a remarkably similar pattern to that of the nation. However, over the course of the remaining time periods (i.e., from 30 days to hearing+), Region I shows marked differences in its submission/timing profile. The Region I data show that documents are submitted with greater frequency in the 6-20 days before hearings (and, concomitantly, with less frequency in the 0-5 days before hearings or at/after hearings) relative to the nation (or other regions).<sup>215</sup> This marked outward “bend in the curve” for Region I over the course of the 30 days leading up to hearings (and thereafter)—particularly its increase in document submissions during the 6-10 day interval—is highly suggestive of a correlation between the five-day rule and the region’s distinct document submission/timing profiles in recent years. Of course, absent changes to SSA’s case processing or information management systems, there is no way to qualitatively assess whether the pilot program has led to timely, pre-hearing submission of material evidence (as opposed to, for example, submission of duplicative or irrelevant documents). Nonetheless, from a quantitative perspective, the pilot program appears to have had an impact on the volume and timeliness of document submissions.

*Issuance of Hearing Notices.* The fifth—and final—area of data analyses specifically related to the Region I pilot program’s 75-day notice requirement. We examined SSA-provided data for CYs 2005 – 2012 to assess the impact of this requirement on the timing for issuance of hearing notices relative to hearing dates. These analyses showed that, while average time intervals between issuance of hearing notices and hearings have been rising steadily at both regional and national levels in recent years, such time interval increases have been especially pronounced in Region I.<sup>216</sup> Moreover, in both CY 2011 and CY 2012, Region I’s annual

<sup>215</sup> See *id.* at App. D, fig. A-14, p. A-26; see also *id.* at App D, pp. A-27 to A-31 (discussing similar results for additional Region 1 analyses relating to the timing and volume of document submissions).

<sup>216</sup> See *id.* at App. D, tbl. A-12 & fig. A-18, pp. A-32 & A-33; see also *id.* at App. D pp. A-33 & A-34.

average time intervals (of 80.8 and 93.9 days respectively) exceeded the 75-day notice requirement's default timeframe for issuance of hearing notices, and CY 2010 was not far off (73.3 days).<sup>217</sup> This trend is not surprising given that only Region I—by virtue of the pilot program—must issue notices of hearing (absent party consent) no less than 75 days prior to hearings. Nonetheless, the data suggest a strong correlation between the Region I pilot program's 75-day notice requirement and the region's rising time intervals between issuance of hearing notices and hearings. However, given that average time intervals also rose substantially in Regions VII and VIII (and nationally) over the same eight-year time period (albeit at a slower pace), it is also likely that there are other causal factors at play beyond simply the 75-day requirement. More detailed data would be needed to conduct the types of analyses from which causal attributions could be potentially formulated.

## **B. Survey & Interview of SSA Employees: Summary of Responses**

As part of our assessment of the impact of the Region I pilot program, we also conducted interviews and surveys of SSA officials throughout the country to get their views on—and “real-world” experiential practices under—hearing notice and evidentiary submission rules applicable in their respective regions, including (for those working in Regions II-X) Region I. More specifically, we administered a national, online survey to ALJs and HODs in all regions, as well as interviewed ALJs and hearing office staff in Regions I, VII, and VIII, and the NHC.<sup>218</sup> We also met with SSA officials from the Appeals Council to obtain their views.<sup>219</sup> Altogether, we interviewed about 80 SSA officials during the course of this study.<sup>220</sup>

While the empirical analyses described in Part III.A above show that the pilot program, as currently implemented in Region I, appears to be making modest strides toward advancing the goals set forth by SSA at its inception (i.e., improving the efficiency, accuracy, and timeliness of the Social Security disability benefits adjudication process), survey and interview results suggest that capturing the overall “real-world” impact (or potential impact) of the pilot program proves especially challenging. In sum, while a solid majority of SSA ALJs and hearing office staff view the Region I pilot program favorably and support its expansion to other regions, varied application (and practices) of the pilot program in Region I—most particularly, the five-day rule—appear to be clouding the “true” (or potential) impact of the program. A detailed discussion of perspectives and practices shared by survey and interview respondents on the Region I pilot program and other regions' notice and evidentiary submission rules are set forth below.

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<sup>217</sup> See *id.* at App. D, tbl. A-12, p. A-32. Neither of the other two regions (or the nation) had two successive years during this eight-year period in which the average time interval between notice and hearing exceeded 75 days. See *id.*

<sup>218</sup> For a detailed summary of the methodology used for surveys conducted (as well as confidence intervals for the four sampled groups of SSA officials), interviews administered, and the selection of interviewees and survey respondents, APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, at App. A, pp. A-1 to A-3.

<sup>219</sup> See *id.*, at App. A, pp. A-2 & A-3 (discussing interview methodology).

<sup>220</sup> See *id.*

## 1. Perspectives on Hearing Notices & Submission of Evidence

This section of the report summarizes the overall views of the Region I pilot program from ALJs and hearing office staff members in Region I and Regions II-X, as well as specific perspectives on the program’s 75-day notice requirement and five-day rule.

### a. Overall Views of the Region I Pilot Program

Overall, strong majorities of SSA ALJs and HODs favor the Region I pilot program. As shown in Table 3 below, across all the regions, 60-80% of all ALJs and HODs who responded to the survey “strongly favor” or “somewhat favor” this program. By comparison, only 9-19% of these same groups of respondents expressed opposition.<sup>221</sup>

**Table 3: SSA Survey Respondents: Overall Views of Pilot Program**

Based on your experience (as an ALJ or HOD in Regions 1-10) over the past year, what is your overall view of the pilot program in Region 1 (i.e., both the 75-day hearing notice requirement and the closing of the record five days before the hearing (absent showing of good cause) requirement)? <sup>222</sup>				
	Region I ALJs	Regions II-X ALJs	Region I HODs	Regions II-X HODs
Answer Options	Response Percent	Response Percent	Response Percent	Response Percent
A) Strongly favor	46.2%	63.0%	33.3%	57.4%
B) Somewhat favor	19.2%	17.7%	50.0%	24.3%
C) Neutral/Undecided	15.4%	9.8%	0.0%	12.2%
D) Somewhat oppose	15.4%	4.5%	0.0%	3.5%
E) Strongly oppose	3.8%	4.8%	16.7%	2..6%

Moreover, many of the ALJs surveyed elected to supplement their basic responses with additional thoughts or comments through use of optional text boxes. Here, too, the dominant sentiment was strong support for the pilot program. ALJs noted, for example, their views that the program rules help encourage representatives to submit evidence in advance of the hearing, be more prepared for the hearing and, as a result, the hearing process is more efficient and effective.<sup>223</sup> As one ALJ surveyed noted: “[The] 75 day notice and five-day submission of evidence rules are proactive in making all scheduled hearings productive and [they] support the demand for judicial economy in the SSA high volume hearing process.”<sup>224</sup> Another ALJ surveyed stated: “[T]he regulations provide the ALJ with solid tools to promote timely, fair and

<sup>221</sup> Additional perspectives from SSA ALJs and HODs surveyed in Region I and Regions II-X are set forth in the text responses to survey questions which are highlighted throughout this section of the report and which can be found in full in APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, at App. E, pp. A-35 to A-132.

<sup>222</sup> See APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, at Apps. E-1 (Region I ALJs), Survey Response # 28, at p. A-43; E-2 (Region I HODs), Survey Response # 25, at p. A-62; E-3 (Regions II-X ALJs), Survey Response # 17, at p. A-72; E-4 (Regions II-X HODs), Survey Response # 16, at p. A-127.

<sup>223</sup> See *id.* at Apps. E-1, Survey Response # 42, at pp. A-52 to A-54; E-3, Survey Response # 27, at p. A-77 to A-121.

<sup>224</sup> *Id.* at App. E-1, Survey Response # 42-5, p. A-53.

complete hearings.”<sup>225</sup> And a third ALJ surveyed stated: “[T]he rules force the [representative] to be active on the claim earlier, thus resulting in a more complete . . . record.”<sup>226</sup>

Interestingly, however, closer review of inter-regional differences in survey responses evidences something akin to a “grass is always greener” dichotomy between the views of the pilot program in Region I relative to the other regions. That is, support for the pilot program is consistently stronger in Regions II-X (where the program is not in effect), than in Region I (where the program’s record closure and hearing notice provisions currently apply). For example, based on Table 3 above, Region I ALJs express favor for the pilot program (i.e., “strongly favor” or “somewhat favor”) at a rate 24% lower than ALJs in Regions II-X. Similarly, ALJs in Region I report feeling “neutral” or “undecided” about the program at nearly twice the rate of neutral-responding ALJs in Region II-X. To be sure, the majority of surveyed ALJs and HODs across all regions favor for the pilot program. Nonetheless, this differential in inter-regional favorability/opposition percentages may be worth further examination by SSA to discern the reasons for this contrast.

In assessing the overall views on the Region I pilot program, it is also important to examine ALJs’ perspectives on its actual (or projected) effects, both positive and negative. The survey responses make plain that the majority of ALJs across all regions believe that the pilot program has (or would have) a beneficial impact on the adjudication process. As shown in Tables 4 and 5 below, majorities of ALJs in both Region I and Regions II-X “strongly agree” or “agree” that the pilot program not only encourages parties to timely submit evidence before hearings, but also improves the evidentiary record, reduces the need for supplemental hearings, and allows an ALJ to adjudicate cases more efficiently and fairly. Similarly, majorities of ALJs responding to the Region I or Regions II-X surveys “strongly disagree” or “disagree” with the notion that the pilot program has no effect on how they adjudicate cases.

**Table 4: Heat Map of Responses by Region I ALJs to Survey Question on Experiences Under Pilot Program**

<b>Question #35:</b> Listed below are some possible experiences you may—or may not—have had in the past year while adjudicating cases under Region 1’s pilot program. For each item listed in the box below, please indicate your level of agreement—based on your own experience—with the following statement: “The pilot program in Region 1 .....” <sup>227</sup>							
Answer Options	Strongly Agree	Agree	Neither Agree or Disagree	Disagree	Strongly Disagree	Rating Average	Response Count
Allows me to review the evidentiary file earlier	23.1%	26.9%	23.1%	23.1%	3.8%	3.42	26
Encourages parties to timely submit evidence before hearings	50.0%	30.8%	11.5%	7.7%	0.0%	4.23	26
Reduces need for supplemental hearings	38.5%	23.1%	19.2%	15.4%	3.8%	3.77	26

<sup>225</sup> *Id.* at App. E-1, Survey Response # 19-2, p. A-49.

<sup>226</sup> *Id.* at App. E-1, Survey Response # 40-2, p. A-52.

<sup>227</sup> *Id.* at App. E-1, Survey Response # 35, p. A-45.

**Question #35:** Listed below are some possible experiences you may—or may not—have had in the past year while adjudicating cases under Region 1’s pilot program. For each item listed in the box below, please indicate your level of agreement—based on your own experience—with the following statement: “The pilot program in Region 1 ....”<sup>227</sup>

Reduces need for consultative examinations	15.4%	23.1%	34.6%	23.1%	3.8%	3.23	26
Allows me to adjudicate cases more efficiently	46.2%	15.4%	26.9%	3.8%	7.7%	3.88	26
Allows me to adjudicate cases more fairly	38.5%	15.4%	30.8%	11.5%	3.8%	3.73	26
Improves the evidentiary record	42.3%	23.1%	19.2%	11.5%	3.8%	3.88	26
Has had no effect on how I adjudicate cases	11.5%	15.4%	15.4%	19.2%	38.5%	2.42	26

(Note: “Heat map” above shows graphical distribution of survey response values by color-coding higher response values with darker colors.)

**Table 5: Heat Map of Responses by Regions II-X ALJs to Survey Question on Experiences Under Pilot Program**

**Question #25:** Listed below are some possible effects expanding Region 1’s pilot program to other SSA Regions may have in your cases. For each item listed in the box below, please indicate your level of agreement—based on your own opinion and experience as an ALJ—with the following statement: “I believe expanding the pilot program in Region 1 to other SSA Regions will ....”<sup>228</sup>

Answer Options	Strongly Agree	Agree	Neither Agree or Disagree	Disagree	Strongly Disagree	Rating Average	Response Count
Allows me to review the evidentiary file earlier	31.7%	31.1%	26.7%	6.8%	3.8%	3.80	679
Encourage parties to timely submit evidence before hearings	65.8%	26.2%	3.1%	3.4%	1.5%	4.52	679
Reduce the need for supplemental hearings	45.4%	31.1%	14.1%	7.2%	2.2%	4.10	679
Reduce the need for consultative examinations	12.4%	19.3%	43.7%	19.6%	5.0%	3.14	679
Allow me to adjudicate cases more efficiently	53.0%	29.3%	11.0%	3.5%	3.1%	4.26	679
Allow me to adjudicate cases more fairly	36.8%	23.0%	26.7%	8.0%	5.6%	3.77	679
Improve the evidentiary record	54.6%	27.5%	11.8%	3.4%	2.7%	4.28	679
Have no effect on how I adjudicate cases	5.0%	7.5%	21.5%	30.9%	35.1%	2.16	679

(Note: “Heat map” above shows graphical distribution of survey response values by color-coding higher response values with darker colors.)

<sup>228</sup> *Id.* at App. E-3, Survey Response # 25, p. A-75.



ALJs in Region I and Regions II-X were also asked about possible *negative* effects of the pilot program on either unrepresented claimants or represented claimants.<sup>229</sup> As depicted in Tables 6 and 7 below, ALJs in Region I and Regions II-X reject the view that claimants or representatives have experienced (or would experience) undue difficulties under the pilot program’s rules. As one ALJ surveyed in Region IV put it: “ALJs bend over backwards to give [claimants] a full and fair hearing.”<sup>230</sup> Indeed, strong majorities of ALJs across all regions “strongly disagree” or “disagree” with statements that this program unduly formalizes the hearing process, interferes with a claimant’s right to a full and fair hearing, prejudices claimants who secure representation late in the process, or is difficult to adhere to because of delays in medical provider responses to medical records requests. The only negative effects with which ALJs expressed modest concern (i.e., response percentages for “strongly agree” or “agree” at or above 20%) were unrepresented claimants’ difficulties in understanding pilot program rules and compliance difficulties because medical providers delay responding to records requests. Indeed, many ALJs we surveyed and interviewed noted that unrepresented claimants would have difficulty complying with the rules because they often depend on the agency for help in understanding the hearing process and obtaining medical records and other pieces of evidence.

**Table 6: Heat Map of Responses by Region I ALJs to Survey Question on Claimant Experiences Under the Pilot Program**

<b>Question #38 : Listed below are some possible experiences that, in your view, claimants and/or their representatives may—or may not—have had in the past year while having claims adjudicated under Region 1’s pilot program. For each item listed in the box below, please indicate your level of agreement—based on your own experience—with the statement that: “The pilot program in Region 1 .....”<sup>231</sup></b>							
<b>Answer Options</b>	<b>Strongly Agree</b>	<b>Agree</b>	<b>Neither Agree or Disagree</b>	<b>Disagree</b>	<b>Strongly Disagree</b>	<b>Rating Average</b>	<b>Response Count</b>
Is difficult for unrepresented claimants to understand	8.0%	28.0%	20.0%	28.0%	16.0%	2.84	25
Unduly formalizes the hearing process	4.0%	4.0%	4.0%	56.0%	32.0%	1.92	25
Interferes with a claimant’s right to a full and fair hearing	8.0%	0.0%	0.0%	52.0%	40.0%	1.84	25
Prejudices claimants who secure representation close to the hearing date	4.0%	4.0%	12.0%	48.0%	32.0%	2.00	25
Leads to incomplete evidentiary records	4.0%	0.0%	12.0%	48.0%	36.0%	1.88	25
Is difficult to comply with because medical providers delay responding to requests for medical records	4.0%	16.0%	16.0%	40.0%	24.0%	2.36	25

<sup>229</sup> These effects have often been offered by opponents of the program as reasons not to expand it to other regions.

<sup>230</sup> See APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, at App. E-1, Survey Response # 42-2, pp. A-52 & A-53.

<sup>231</sup> *Id.* at App. E-1, Survey Response # 38, p. A-46.

**Question #38** : Listed below are some possible experiences that, in your view, claimants and/or their representatives may—or may not—have had in the past year while having claims adjudicated under Region 1’s pilot program. For each item listed in the box below, please indicate your level of agreement—based on your own experience—with the statement that: “The pilot program in Region 1 .....”<sup>231</sup>

Fails to account for a claimant’s need to submit new (or updated) medical evidence due to changes in his/her medical condition	4.0%	8.0%	16.0%	48.0%	24.0%	2.20	25
Does not seem to have any effect on claimants and/or their representatives	4.0%	16.0%	40.0%	20.0%	20.0%	2.64	25

(Note: “Heat map” above shows graphical distribution of survey response values by color-coding higher response values with darker colors.)

**Table 7: Heat Map of Responses by Region II-X ALJs to Survey Question on Claimant Experiences Under the Pilot Program**

Listed below are some possible effects that expanding Region 1’s pilot program to other SSA Regions may have on claimants and/or their representatives. For each item listed in the box below, please indicate your level of agreement—based on your own opinion and experience as an ALJ—with the following statement: “I believe expanding the pilot program in Region 1 to other SSA Regions.....”<sup>232</sup>

Answer Options	Strongly Agree	Agree	Neither Agree or Disagree	Disagree	Strongly Disagree	Rating Average	Response Count
Would make it more difficult for unrepresented claimants to understand the process	6.5%	15.2%	22.5%	37.1%	18.6%	2.54	676
Would unduly formalize the hearing process	2.5%	4.1%	11.8%	42.8%	38.8%	1.89	676
Would interfere with a claimant’s right to a full and fair hearing	3.7%	3.3%	10.1%	37.9%	45.1%	1.83	676
Would prejudice claimants who secure representation close to the hearing date	3.8%	12.1%	16.0%	42.8%	25.3%	2.26	676
Would lead to incomplete evidentiary records	3.7%	8.3%	14.2%	42.6%	31.2%	2.11	676
Would be difficult to comply with because medical providers delay in responding to requests for medical records	6.7%	15.8%	18.0%	39.1%	20.4%	2.49	676
Fails to account for a claimant’s need to submit new (or updated) medical evidence due to changes in his/her medical condition	6.8%	12.4%	17.8%	40.1%	22.9%	2.40	676
Would not appear to have any effect on claimants and/or their representatives	10.7%	17.6%	27.1%	30.0%	14.6%	2.80	676

<sup>232</sup> *Id.* at App. E-3, Survey Response # 26, p. A-75.

With respect to expansion of the pilot program, ALJs across all regions expressed strong support for its implementation beyond Region I. About 70% of surveyed ALJs from both Region I and Regions II-X agreed that the pilot program should be expanded to other regions.<sup>233</sup> Supporters of expansion posited a variety of positive effects they believed would flow from moving the pilot program outside the confines of Region I. For example, an ALJ in Region IV expressed the following view: “[T]his is a [program] that needs to be quickly and fully implemented.”<sup>234</sup> Another Region IV ALJ surveyed noted that “[a]pplying Region I’s policies would greatly help us handle cases promptly, reduce backlog, and require attorneys to do their jobs properly.”<sup>235</sup> A third ALJ from Region IV stated that expansion would “[i]mprove the quality of representation, reduce the incidence of low merit cases, improve the quality of evidence, reduce the total volume of medical exhibits, significantly reduce processing time and [reduce] post-hearing delays in record completion.”<sup>236</sup> And a Region I ALJ noted: “I think the pilot has been a good thing and I would favor it being uniformly applied nationally.”<sup>237</sup>

In addition to ALJs, we also asked Appeals Council officials during interviews their overall impression of Region I’s pilot program. Most of the Appeals Council officials interviewed expressed support for the 75-day notice requirement and the five-day rule.<sup>238</sup> They viewed the pilot program as furthering the agency’s goals of making sure those who merit disability benefits are paid as early as possible and of quickly achieving final resolution in a case.<sup>239</sup> As one Administrative Appeals Judge (“AAJ”) noted: “The two rules taken together help to ensure a fair and balanced adjudication system which make sure meritorious claims are paid as quickly as possible.”<sup>240</sup>

Many Appeals Council officials expressed their belief that the pilot program should be expanded nationwide to improve efficiency in the adjudicatory process by encouraging timely submission of evidence. As one AAJ put it: “If the Region I pilot program’s rules were expanded to other regions, better decisions would result and there would be less appeals.”<sup>241</sup> Indeed, the majority of Appeals Council officials interviewed believed that expansion of the program to other regions would result in fewer appeals, thus making the appellate body’s workload lighter and the adjudicatory process more efficient. Many AAJs also expressed support for pilot program expansion because they felt that having the 75-day notice requirement and the five-day rule would prevent some representatives from strategically withholding evidence in order to get a “second bite at the apple” at the Appeals Council level.<sup>242</sup> Several officials noted that they have reviewed cases where new evidence was submitted on appeal that

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<sup>233</sup> See *id.* at Apps. E-1, Survey Response # 41, p. A-47; E-3, Survey Response # 24, p. A-74.

<sup>234</sup> See *id.* at App. E-3, Survey Response # 27-122, pp. A-94 & A-95.

<sup>235</sup> See *id.* at App. E-3, Survey Response # 27-112, p. A-92.

<sup>236</sup> See *id.* at App. E-3, Survey Response # 27-27, p. A-80.

<sup>237</sup> See *id.* at App. E-1, Survey Response # 42-4, p. A-53.

<sup>238</sup> See In-person interviews with Appeals Council officials (Jan. 29-30, 2013) [hereinafter Appeals Council Interview] (interview notes on file with authors).

<sup>239</sup> See *id.*

<sup>240</sup> See In-person interview with AAJ (Jan. 29, 2013) [hereinafter AAJ Jan. 29 Interview] (interview notes on file with authors).

<sup>241</sup> See In-person interview with AAJ (Jan. 30, 2013) (interview notes on file with authors).

<sup>242</sup> See Appeals Council Interview, *supra* note 238.

could have been submitted at the initial hearing and they believe some representatives intentionally withhold evidence.<sup>243</sup>

Not every Appeals Council official we interviewed supported expansion of the Region I pilot program. A minority of such individuals questioned the extent to which the program's rules are consistently followed and accordingly, the true impact of the program.<sup>244</sup> One AAJ expressed doubt that either the five-day rule or the 75-day notice requirement had much effect on the appeals process, and stated: "In general, very few cases I review even involve the issue of new evidence at all so the five-day rule never comes up in any of my cases."<sup>245</sup> Similarly, another AO seemed skeptical about whether the five-day rule impacts evidentiary submissions, noting that the rule appeared to be rarely used to exclude evidence because ALJs in Region I generally admitted evidence under the good cause exception. "I have never read an ALJ decision which excluded evidence based on the five-day rule," this AO said.<sup>246</sup>

In sum, majorities of ALJs, HODs, and Appeals Council officials we surveyed and interviewed viewed Region I's pilot program favorably and support its expansion to other regions. Nonetheless, within this pool of support, there exist varying views on particular aspects of the pilot program's five-day rule and 75-day notice requirement that warrant closer examination. Accordingly, we turn below to an exploration of the specific perspectives of ALJs, HODs, and members of the Appeals Council on the five-day rule and 75-day notice requirement as illuminated by surveys and interviews responses.

## **b. Five-Day Rule**

The majority of surveyed ALJs and HODs across all regions expressed support for the five-day rule. Tables 8 and 9 below provide the survey response percentages for ALJs and HODs in Region I and Regions II-X respectively. Respondents expressed solid support for the five-day rule, with favorable response percentages (i.e., "strongly" or "somewhat" favorable) averaging 80% across all four groups. By contrast, no more than 7.7% of respondents to any survey expressed opposition (i.e., "somewhat oppose" or "strongly oppose") to the rule. One ALJ in Region I explained his support for the rule (via survey text box) by noting that "[the rule has] helped representatives understand that they must request evidence from medical providers much sooner than they did in the past; has greatly reduced the need to keep the record open for additional evidence; [and] [h]as made the overall hearing process more efficient."<sup>247</sup>

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<sup>243</sup> See *id.*

<sup>244</sup> Indeed, survey and interview responses regarding current notice of hearing and evidentiary submission practices in Region I appear to show that enforcement of the pilot program is inconsistent. For a full discussion of these practices and the apparent inconsistency, see *infra* Pt. III.B.2.

<sup>245</sup> See In-person interview with AAJ (Feb. 4, 2013) (interview notes on file with authors).

<sup>246</sup> See In-person interview with AO (Jan. 29, 2013) (interview notes on file with authors).

<sup>247</sup> See *id.* at App. E-1, Survey Response # 40-4, p. A-52.

**Table 8: Views of Region I ALJs/HODs on Five-Day Rule**

Based on your experience as an ALJ in Region 1 (or a HOD in Region 1) over the past year, what is your view of the closing of the record five days before the hearing (absent showing of good cause) requirement portion of Region 1's pilot program? <sup>248</sup>		
	ALJs	HODs
Answer Options	Response Percent	Response Percent
A) Strongly favor	57.7%	83.3%
B) Somewhat favor	23.1%	16.7%
C) Neutral/Undecided	3.8%	0.0%
D) Somewhat oppose	7.7%	0.0%
E) Strongly oppose	7.7%	0.0%

**Table 9: Views of Regions II-X ALJs/HODs on Five-Day Rule**

Based on your experience as an ALJ (or HOD) at SSA, what is your view of the closing of the record five days before the hearing (absent showing of good cause) requirement portion of Region 1's pilot program? <sup>249</sup>		
	ALJs	HODs
Answer Options	Response Percent	Response Percent
A) Strongly favor	76.2%	72.2%
B) Somewhat favor	12.0%	15.7%
C) Neutral/Undecided	2.9%	7.0%
D) Somewhat oppose	3.7%	4.3%
E) Strongly oppose	5.1%	0.9%

Survey respondents were also asked for their views (if any) on whether the five-day rule provided “the right amount” of time to adequately review the record (ALJ surveys) or properly prepare the evidentiary file (HODs). Responses to the four surveys plainly showed that ALJs and HODs in Region I and Regions II-X believe that closing the record five days before a hearing (subject to good cause exceptions) indeed provides the right amount of time for both tasks (*see* Tables 10 and 11 below). While most respondents viewed the five-day rule favorably, a minority of respondents—ranging from 12% (Regions II-X HODs) to 24% (Regions II-X ALJs)—believed five days was not enough time. Survey respondents suggesting longer timeframes (via text box) recommended, on average, that the record instead close 10-12 days before the hearing.<sup>250</sup>

<sup>248</sup> *See id.* at Apps. E-1, Survey Response # 32, at p. A-44; E-2, Survey Response # 29, at pp. A-63 & A-64.

<sup>249</sup> *See id.* at Apps. E-3, Survey Response # 21, pp. A-73 & A-74; App. E-4, Survey Response # 20, p. A-128.

<sup>250</sup> *See id.* at Apps. E-1, Survey Response # 34, p. A-50; App. E-3, Survey Response # 23, p. A-77; E-4, Survey Response # 19, p. A-129.

**Table 10: Responses of Region I ALJs/HODs to Survey Question on Propriety of Timeframe in Five-Day Rule**

<b>What do you think of the current rule in Region 1 closing the evidentiary record five (5) days before the hearing (absent a showing of good cause)—that is, does it give ALJs the right amount of time to adequately review the evidentiary record before the hearing (or for HODs, does it give case managers the right amount of time to properly prepare the evidentiary file before ALJs review of the record before a hearing)?<sup>251</sup></b>		
	<b>ALJs</b>	<b>HODs</b>
<b>Answer Options</b>	<b>Response Percent</b>	<b>Response Percent</b>
A) Far too little time	7.7%	0.0%
B) Too little time	7.7%	16.7%
C) Just right	76.9%	83.3%
D) Too much time	3.8%	0.0%
E) Far too much time	3.8%	0.0%

**Table 11: Responses of Regions II-X ALJs/HODs to Survey Question on Propriety of Timeframe in Five-Day Rule**

<b>What do you think of the current rule in Region 1 closing the evidentiary record five (5) days before the hearing (absent a showing of good cause)—that is, does it give ALJs the right amount of time to adequately review the evidentiary record before the hearing (or for HODs, does it give case managers the right amount of time to properly prepare the evidentiary file before ALJs review of the record before a hearing)?<sup>252</sup></b>		
	<b>ALJs</b>	<b>HODs</b>
<b>Answer Options</b>	<b>Response Percent</b>	<b>Response Percent</b>
A) Far too little time	2.9%	0.0%
B) Too little time	20.9%	12.2%
C) Just right	72.8%	85.2%
D) Too much time	2.8%	2.6%
E) Far too much time	0.6%	0.0%

Interviews with SSA employees, moreover, generally evidenced these same levels of support for the five-day rule. During interviews, we asked Region I and Regions II-X ALJs and hearing office staff whether, in their view, the pilot program’s five-day rule provided the right amount of time for pre-hearing compilation and review of the evidentiary record. The ALJs generally spoke in support of this record-closing timeframe.<sup>253</sup> Most judges noted that they review the record one to three days before the hearing, so that closing the record five days prior

<sup>251</sup> *Id.* at Apps. E-1, Survey Response # 33, p. A-44 & A-45; E-2, Survey Response # 30, p. A-64.

<sup>252</sup> *Id.* at Apps. E-3, Survey Response # 22, p. A-74; E-4, Survey Response # 21, p. A-128.

<sup>253</sup> See In-person, video teleconference, and telephone interviews with ALJs in Regions I, VII, and VIII (Feb. 4-5 and Feb. 11-14, 2013) [hereinafter Multiple ALJ Feb. Interviews] (interview notes on file with authors).

to the hearing provides provided them adequate time for pre-hearing record review. However, as with some survey respondents, a few Region I ALJs we interviewed suggested that the record should close more than five days before the hearing. One ALJ in Hartford, CT opined that it would be preferable if the record closed fourteen days before the hearing, though he also added that his preferred record-closure timeframe might not be realistic given the burden it might place on representatives seeking to obtain claimants' medical records from health care providers who delayed responding to such requests.<sup>254</sup> Another ALJ in Portland, ME stated that he felt a rule closing the record 10 days before the hearing would be more appropriate because this would allow hearing office staff to send a claimant's medical records to a medical expert in advance of the hearing.<sup>255</sup>

Hearing office staff that we interviewed (i.e., case technicians, decision writers, group supervisors, and hearing office directors) in Regions I, VII, and VIII, also expressed broad support for the record-closing timeframe embodied in the five-day rule.<sup>256</sup> Nonetheless, a few hearing office staffers told us that extending record closure from five days to seven to 10 days before the hearing would be better.<sup>257</sup> The individuals who made these suggestions noted that doing so would give hearing office staff more time before the hearing to properly review and organize claimants' evidentiary submissions.<sup>258</sup>

Lastly, our interviews and surveys of SSA ALJs and other hearing office staff illuminated three additional matters related to the five-day rule that warrant discussion: (1) the interrelated nature of issues relating to expansion, uniformity, and enforcement of the rule; (2) perceived tension between the rule and an ALJ's duty to develop the record; and (3) concerns about enforcing the rule against unrepresented claimants. Each of these areas is discussed in brief below.

*Interrelated Issues of Expansion and Enforcement of the Five-day Rule.* Many surveyed ALJs, as well as those with whom we met, stated that their views on whether (or how) to expand the five-day rule beyond Region I are inextricably entwined with effective enforcement of the rule. Several Region I ALJs we spoke to who favored expansion of the five-day rule to other regions expressed a belief that a national rule on closing the evidentiary record would be best. For example, one ALJ in Providence, RI opined that it makes little sense to enforce different evidentiary/record-closure rules across regions; accordingly, he hoped the five-day rule would be expanded beyond Region I.<sup>259</sup>

Some Region I ALJs also emphasized the importance of ensuring effective enforcement of the rule (i.e., preclusion of untimely evidence absent showing of good cause) should it be

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<sup>254</sup> See Video teleconference interview with ALJ (Feb. 4, 2013) [hereinafter ALJ Feb. 4 VTC Interview] (interview notes on file with authors).

<sup>255</sup> See Video teleconference interview with ALJ (Feb. 5, 2013) [ALJ Feb. 5 VTC Interview] (interview notes on file with authors).

<sup>256</sup> See In-person, video teleconference, and telephone interviews with hearing office staff members in Regions I, VII, and VIII (Feb. 4-5 and Feb. 11-14, 2013) (interview notes on file with authors).

<sup>257</sup> See *id.*

<sup>258</sup> *Id.*

<sup>259</sup> See ALJ Feb. 4 VTC Interview, *supra* note 254.

expanded to other regions.<sup>260</sup> “If [SSA] is going to expand the five-day rule to other regions,” noted an ALJ in Boston, MA, “the agency should make sure it has some teeth first.”<sup>261</sup> Similarly, a senior judge in Boston, MA conditioned his support for expansion of the rule outside the region on effective enforcement and assessment: “We need to do a better job of enforcing and evaluating the five-day rule right here in Region I, before expanding it to other regions.”<sup>262</sup> An ALJ from Portland, ME suggested that if the five-day rule were expanded, training ALJs on how and when to enforce the rule would be critical.<sup>263</sup> One ALJ surveyed in Region V noted: “The five-day rule is good, although I would like to ensure that the ‘good cause’ [exception] is not so broad as to make the five-day rule meaningless.”

*Perceived Tension between Five-Day Rule and ALJ Record-Development Duties.* A number of ALJs that we interviewed, as well as surveyed, expressed their concern that the five-day rule stood in tension with their affirmative duty to ensure a fully-developed record. One ALJ surveyed in Region VII out it this way:

Closing the record before the hearing is patently unfair to the claimant and is placing the efficiency of process over a claimant’s right to have a fair hearing. Part of the duty of the ALJ is to fully and fairly develop the record. This process places an unfair burden on the claimant.<sup>264</sup>

Another ALJ interviewed in Boston, MA expressed her wariness of excluding evidence under the five-day rule, even when submitted on an untimely basis, because of her duty to develop the record.<sup>265</sup> “I worry that if I do not admit the evidence, the case will come back on remand from the Appeals Council because of my failure to develop the record,” she said.<sup>266</sup> Such concerns from a minority of ALJs stand in contrast to the generally favorable views afforded the pilot program (including the five-day rule) by ALJs and HODs in their survey responses, as well as the support for the five-day rule expressed by Appeals Council officials whom we interviewed for this report.<sup>267</sup>

To be sure, only a few of the Region I ALJs we interviewed believed the five-day rule as standing in tension with their duty to develop the record. One ALJ in Portland, ME noted that closing the record five days before the hearing actually helps him perform his duty as an ALJ better because the five-day rule encourages claimants and their representatives to be more aggressive about submitting evidence in a timely fashion before the hearing, which means he can

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<sup>260</sup> Issues with current evidentiary submission practices in Region I and enforcement of the five-day rule are discussed more fully *infra* Pt. III.B.2.

<sup>261</sup> See In-person interview with ALJ (Feb. 5, 2013) [hereinafter ALJ Feb. 5 Interview] (interview notes on file with authors).

<sup>262</sup> See In-person interview with ALJ (Feb. 4, 2013) [hereinafter ALJ Feb. 4 Interview] (interview notes on file with authors).

<sup>263</sup> See ALJ Feb. 5 VTC Interview, *supra* note 255.

<sup>264</sup> See APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, at Apps. E-3, Survey Response # 27-124, at p. A-95.

<sup>265</sup> See ALJ Feb. 5. Interview, *supra* note 255.

<sup>266</sup> See *id.*

<sup>267</sup> A summary of the Appeals Council’s favorable views on the Region I pilot program is provided *supra* Pt. III.B.1.a.



review the record and potentially issue a decision earlier.<sup>268</sup> “In my mind, there is no tension. Closing the record ensures administrative finality, making sure that evidence is examined and cases are processed in a timely manner so that disability benefits can be paid as soon as possible,” he said.<sup>269</sup>

*Concerns about Enforcement of Five-Day Rule against Unrepresented Claimants.* Many ALJs we interviewed and surveyed made plain their concerns that, because unrepresented claimants face special challenges, compliance with the five-day rule was (or would be) difficult and, in some cases, impossible. Nearly all of the Region I ALJs responding to our survey reported “almost always” or “frequently” granting unrepresented claimants’ requests for good cause exceptions.<sup>270</sup> ALJs in other regions expressed similar views. A number of such ALJs noted either not supporting expansion of the five-day rule to the extent it would apply to unrepresented claimants, or, if the rule was expanded, supporting inclusion of special precautions to ensure that unrepresented claimants were not unfairly prejudiced or unduly burdened.<sup>271</sup> As one ALJ in Region X put it: “The unrepresented claimants that I see have no ability, physically or mentally, to comply with the requirement.”<sup>272</sup>

Similarly, almost all of the ALJs interviewed in Regions I, VII, and VIII reported either not enforcing the five-day rule against unrepresented claimants or invariably invoking the good cause exception as a basis for admitting untimely evidence. For example, an ALJ in Lawrenceville, MA explained that he did not think the five-day rule should apply to unrepresented claimants because, in his view, they did not know enough about the procedural rules. To do otherwise, he believed, would lead to improvident denial of potentially meritorious claims for benefits.<sup>273</sup> Another ALJ in Providence, RI observed that, while most of the claimants that appear before him are represented, he is much more lenient with those few without representation.<sup>274</sup> He went on to explain that, instead of disallowing untimely evidence from unrepresented claimants, he would often develop the record on his own by ordering a CE after the hearing or getting additional medical expert testimony.<sup>275</sup>

### **c. 75-Day Notice Requirement**

Both the survey results and interview responses evidence broad and overwhelmingly favorable support for the 75-day notice requirement. Indeed, as shown in Tables 12 and 13 below, the vast majority of ALJs and HODs surveyed in Region I and Regions II-X “strongly favor” or “favor” the 75-day notice requirement.

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<sup>268</sup> See ALJ Feb. 5 Interview, *supra* note 261.

<sup>269</sup> See *id.*

<sup>270</sup> See APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, at App. E-1, Survey Response # 15, p. A-39 (total of 96% of Region I ALJ survey respondents reported “almost always” or “frequently” granting good cause-based requests for submission of evidence less than five days before hearings).

<sup>271</sup> See *id.* at Apps. E-1, Survey Response # 38, p. A-46; E-3, Survey Response # 26, pp. A-75 & A-76; see also Multiple ALJ Feb. Interviews, *supra* note 253.

<sup>272</sup> See APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, at App. E-3, Survey Response # 27-66, p. A-85.

<sup>273</sup> See ALJ Feb. 4 VTC Interview, *supra* note 254.

<sup>274</sup> See ALJ Feb. 5 VTC Interview, *supra* note 255.

<sup>275</sup> *Id.*

**Table 12: Responses of Region I ALJs/HODs to Survey Question on Experiences Under 75-Day Hearing Notice Requirement**

Based on your experience as an ALJ in Region 1 (or HOD in Region 1) over the past year, what is your overall view of the 75-day hearing notice requirement portion of the pilot program in Region 1? <sup>276</sup>		
	ALJs	HODs
Answer Options	Response Percent	Response Percent
A) Strongly favor	50.0%	33.3%
B) Somewhat favor	19.2%	33.3%
C) Neutral/Undecided	7.7%	0.0%
D) Somewhat oppose	15.4%	16.7%
E) Strongly oppose	7.7%	16.7%

**Table 13: Responses of Regions II-X ALJs/HODs to Survey Question on Experiences Under 75-Day Hearing Notice Requirement**

Based on your experience as an ALJ (or as a HOD) at SSA, what is your overall view of the 75-day hearing notice requirement portion of the pilot program in Region 1? <sup>277</sup>		
	ALJs	HODs
Answer Options	Response Percent	Response Percent
A) Strongly favor	40.0%	40.9%
B) Somewhat favor	24.2%	29.6%
C) Neutral/Undecided	19.4%	16.5%
D) Somewhat oppose	9.5%	9.6%
E) Strongly oppose	6.9%	3.5%

Similarly, the majority of ALJs and HODs surveyed in Region I and Regions II-X agree that 75 days’ notice is the right amount of time to provide to claimants and/or their representatives (*see* Tables 14 and 15 below). Notably, however, some 38% of ALJs in Region I and 46% of ALJs in Regions II-X believed that 75 days’ notice provides claimants and representatives with “too much time” or “far too much time.” Survey respondents suggesting shorter timeframes (via text box) recommended, on average, that the hearing notice be issued 49-50 days prior to the hearing.<sup>278</sup>

<sup>276</sup> See APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, Apps. E-1, Survey Response # 29, at A-43; E-2, Survey Response # 26, p. A-63.

<sup>277</sup> See *id.* at Apps. E-3, Survey Response # 18, at p. A-73; E-4, Survey Response # 17, at p. A-127.

<sup>278</sup> See *id.* at Apps. E-1, Survey Response # 31, at p. A-50; E-3, Survey Response # 20, at p. A-76; E-4, Survey Response # 19, at p. A-129.

**Table 14: Responses of Region I ALJs/HODs to Survey on Propriety of Timeframe in 75-Day Hearing Notice Requirement**

What do you think of the current rule in Region 1 requiring at least 75 days' notice of a hearing date—that is, does it give the right amount of advance notice to claimants and/or their representatives? <sup>279</sup>		
	ALJs	HODs
Answer Options	Response Percent	Response Percent
A) Far too little time	0.0%	0.0%
B) Too little time	3.8%	0.0%
C) Just right	57.7%	83.3%
D) Too much time	30.8%	0.0%
E) Far too much time	7.7%	16.7%

**Table 15: Responses of Regions II-X ALJs/HODs to Survey Question on Propriety of Timeframe in 75-Day Hearing Notice Requirement**

What do you think of the current rule in Region 1 requiring at least 75 days' notice of a hearing date—that is, does it give the right amount of advance notice to claimants and/or their representatives? <sup>280</sup>		
	ALJs	HODs
Answer Options	Response Percent	Response Percent
A) Far too little time	0.3%	0.9%
B) Too little time	2.8%	0.9%
C) Just right	51.5%	57.4%
D) Too much time	39.4%	35.7%
E) Far too much time	6.0%	5.2%

During their interviews, Region I ALJs expressed the same strong support for the 75-day notice requirement as found in the survey responses.<sup>281</sup> Several ALJs noted that they support the rule because 75 days provides the claimant or their representative enough time both to request medical records from providers and submit such records to the hearing office in a timely fashion. As one ALJ in Portland, ME opined: “Seventy-five days is enough time for any diligent representative to prepare for the hearing by gathering and submitting evidence in advance of the hearing.”<sup>282</sup> When asked whether the 75-day notice requirement burdens them in any way, most Region I ALJs noted that it does not because they are now used to having their cases scheduled far in advance of the hearing in order to adhere to this requirement.

Although some hearing offices in Region I send out notices of hearing farther in advance than required under the rule, the majority of Region I ALJs we interviewed did not believe that

<sup>279</sup> *Id.* at Apps. E-1, Survey Response # 30, p. A-44; E-2, Survey Response # 27, p. A-63.

<sup>280</sup> *Id.* at Apps. E-3, Survey Response # 19, p. A-73; E-4, Survey Response # 18, p. A-127.

<sup>281</sup> See In-person and video teleconference interviews held with ALJs in Region I (Feb. 4-5, 2013) (interview notes on file with authors).

<sup>282</sup> See ALJ Feb. 5 VTC Interview, *supra* note 255.

the required notice period should not be any longer than 75 days and, like some survey respondents, felt that a shorter notice timeframe—such as 45 or 60 days—would be adequate. One ALJ in Providence, RI, who previously worked as a claimants’ representative, noted that he simply did not see the point of sending out notices any earlier than 75 days. “The 75-day notice requirement provides just the right amount of time,” he asserted, “[and] additional time is not needed because, based on my experience, claimants’ representatives would not use that additional time, they would simply sit on the case until it gets closer to the hearing date.”<sup>283</sup> Only a few Region I ALJs interviewed expressed a desire to provide more advance notice. For example, a senior judge in Lawrenceville, MA stated that, although he believes 75 days is enough notice time, he would prefer a rule providing 90 days just to make sure representatives had enough notice to gather and submit evidence in a timely fashion.<sup>284</sup>

As with Region I ALJs, the majority of Regions VII and VIII ALJs we interviewed also expressed support for expansion of the 75-day notice requirement to other regions in order to have national consistency in notice requirements and facilitate a more efficient adjudicatory process.<sup>285</sup> Most of these ALJs agreed that the additional time provided by 75 days’ notice of a hearing date would promote better pre-hearing record development by claimants and representatives. As one ALJ in Denver, CO observed, evidentiary records in those cases where notice is provided at least 60 days in advance tend to be better developed than the records in those cases where notice is provided only 30 or 45 days in advance.<sup>286</sup> Similarly, an ALJ in Kansas City, MO noted that giving claimants and their representatives as much notice as possible helps provide needed time to develop the evidentiary record for a case.<sup>287</sup>

Support for expansion of the 75-day notice requirement among ALJs in Regions II-X was not, however, absolute. A small minority of ALJs believed either that providing such advance notice was problematic or unduly burdensome. Survey respondents in these regions who suggested an alternative notice timeframe (via text box) recommended, on average, that notices of hearing be issued 49 days before the hearing.<sup>288</sup> For example, an ALJ surveyed in Region V asserted: “The 75-day notice requirement is onerous and [would] make[] scheduling difficult.”<sup>289</sup> A few ALJs surveyed also expressed concern that issuing notices 75 days before hearings might lead claimants—particularly unrepresented claimants—to forget to show up for their hearings. Some ALJs in Regions VII and VIII thought 75 days was excessive and would pose an undue burden on SSA staff who schedule cases. As well, an ALJ in Sioux Falls, SD believed that requiring 75 days’ notice would create difficulties in planning his hearing schedule and could make scheduling vacations or work absences more difficult.<sup>290</sup> A few ALJs we surveyed and interviewed also expressed skepticism that implementation of a 75-day notice requirement would

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<sup>283</sup> See *id.*

<sup>284</sup> See ALJ Feb. 4 VTC Interview, *supra* note 254.

<sup>285</sup> See Multiple ALJ Feb. Interviews, *supra* note 253.

<sup>286</sup> See Video teleconference interview with ALJ (Feb. 13, 2013) [hereinafter ALJ Feb. 13 VTC Interview] (interview notes on file with authors).

<sup>287</sup> See Video teleconference interview with ALJ (Feb.14, 2013) (interview notes on file with authors).

<sup>288</sup> See APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, Apps. E-3, Survey Response # 20, at A-76; see also *id.* at E-4, Survey Response # 19, p. A-129 (Regions II – X HODs) (suggesting, on average, alternative notice timeframe of 49 days prior to hearings).

<sup>289</sup> See *id.* at App. E-3, Survey Response # 1, p. A-67.

<sup>290</sup> See ALJ Feb. 13 VTC Interview, *supra* note 286.

lead to earlier submission of evidence. They believed that representatives would not use this extra time to prepare their claimants' case, but, instead, would procrastinate and still submit evidence close to the hearing date.

Generally, hearing office staff members whom we interviewed in Regions I, VII, and VIII voiced strong support for the 75-day notice requirement as well as its expansion to other regions.<sup>291</sup> Region I staff members supporting expansion of the notice requirement observed that implementation of the requirement in their region has led to earlier submission of evidentiary records, which, in turn, affords staff sufficient time to prepare records for review by ALJs and other hearing office staff. Similarly, the majority of staff members interviewed in Regions VII and VIII favored expanding the 75-day requirement to all regions. Many staff members in Regions VII and VIII expressed hope that having such a requirement governing the issuance of hearing notices would bring more consistency and efficiency to the hearing process across regions. As with many ALJs, staff members also expressed the hope that, if claimants' representatives received additional advance hearing notice, they would make greater efforts to obtain and submit medical records earlier, thus making it easier for SSA staff to prepare and review the case record prior to a hearing.

## ***2. Current Practices Regarding Hearing Notices & Submission of Evidence***

A critical aspect of assessing the impact of the Region I pilot program is identifying and comparing the current notice of hearing and evidentiary submission practices in Region I with those of other regions. An assessment of the pilot program would be incomplete without discussion of how the program works in practice. This section of the report, therefore, sets forth gives an overview of current practices based on surveys, interviews, and, to a lesser extent, empirical analyses.

### **a. Current Practices in Region I**

Through both interviews and survey responses from ALJs and hearing office staff in Region I, we learned that, while the 75-day notice requirement is regularly followed by hearing offices, implementation of the five-day rule varies throughout the region. These variations arise for a variety of reasons, including: (1) claimants and representatives fail to timely submit evidence; (2) when evidence is submitted less than five days before a hearing, some ALJs nonetheless invariably allow late evidentiary submissions without inquiry; and (3) ALJs have different perspectives on their discretion under the five-day rule, as well as circumstances satisfying the “good cause” exception. Accordingly, even though views of the pilot program are favorable throughout hearing offices in Region I, variations in implementation and application of the pilot program—predominantly relating to the five-day rule—makes assessing the overall “real-world” impact (or potential impact) of the pilot program particularly challenging.

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<sup>291</sup> See Multiple ALJ Feb. Interviews, *supra* note 253.

*Notices of Hearing*

Under the Region I pilot program, hearing offices are required to issue notices of hearing at least 75 days before the hearing unless the claimant agrees to a shorter period.<sup>292</sup> Our research for this study—including empirical analyses, surveys, and interviews—consistently establishes that Region I hearing offices in recent years have indeed been issuing hearing notices 75 days in advance of hearings in the vast majority of cases. From an empirical perspective, as noted above, Region I has experienced particularly pronounced increases in the average time interval between issuance of hearing notices and hearings in recent years; indeed, in both CY 2011 and CY 2012, the annual average time intervals (of 80.8 and 93.9 days respectively) in the region exceeded the 75-day notice requirement’s default timeframe.<sup>293</sup> This empirical finding is further buttressed by survey results from Region I ALJs and HODs, the majority of whom reported that their offices send notices out 75 days or more in advance of hearings.<sup>294</sup> As Table 16 below shows, only 7% of ALJs and 14% of HODs reported that their offices sent out notices less than 75 days before the hearing.

**Table 16: Responses of Region I ALJs/HODs to Survey Question on Timing of Hearing Notices**

<b>In the past year, about how long before a hearing were notices of hearing typically sent by your office to claimants?</b> <sup>295</sup>		
<b>Answer Options</b>	<b>ALJs Response Percent</b>	<b>HODs Response Percent</b>
A) Less than 75 days before the hearing	7.4%	14.3%
B) 75 days before the hearing	44.4%	57.1%
C) 90 days before the hearing	25.9%	28.6%
D) 120 days before the hearing	3.7%	0.0%
E) More than 120 days before the hearing	3.7%	0.0%
F) Don’t know/Not sure	14.8%	0.0%

Similarly, when we met with Region I ALJs and hearing office staff, they indicated consistent adherence to the 75-day notice requirement. Every Region I ALJ or hearing office staff member stated that the current practice in their office is to send notices of hearing to claimants and representatives (if any) at least 75 days in advance of the hearing date.<sup>296</sup> Several interviewees indicated that notices are sent out even earlier in certain Region I offices. For example, ALJs in Portland, ME, Hartford, CT and Providence, RI noted that in many cases, their offices mailed notices 90 days in advance of hearings.<sup>297</sup>

<sup>292</sup> See 20 C.F.R. §§ 405.315(a), 405.316(a) (2012).

<sup>293</sup> See discussion *supra* Pt. III.A.

<sup>294</sup> See APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, Apps. E-1, Survey Response # 3, at p. A-35; E-2, Survey Response # 3, at p. A-55.

<sup>295</sup> See *id.* at Apps. E-1, Survey Response # 3, at p. A-35 & E-2, Survey Response # 3, at p. A-55.

<sup>296</sup> See In-person and video teleconference interviews with Region I ALJs and hearing office staff members (case technicians, decision-writers, group supervisors, and hearing office directors) (Feb. 4-5, 2013) (interview notes on file with authors).

<sup>297</sup> See *id.*

A few ALJs with whom we spoke observed that their respective offices, in the past, may have been less consistent in meeting the 75-day requirement. For example, one senior ALJ in Hartford, CT stated that judges experienced an initial period of adjustment (since, prior to the pilot program, offices only scheduled hearings 20 to 30 days in advance of hearings), but that the majority of ALJs in her office were now used to scheduling their cases well in advance and, thus, had no problem adhering to the 75-day requirement.<sup>298</sup> Similarly, many Region I staff members we interviewed noted that the 75-day notice requirement is now just considered the “norm” in their offices; some even noted that their offices issue notices even earlier than required—up to 90 or 120 days before the hearing.

Submission of Evidence

Thus, while hearing offices in Region I appear to be consistently applying the 75-day notice requirement, current practices under the five-day rule, on the other hand, reveal a sizeable degree of variation—among claimants and/or representatives, as well as ALJs. As set forth below in Tables 17 and 18, according to ALJs and HODs in Region I responding to the survey, represented claimants consistently follow the five-day rule only about half of the time.<sup>299</sup>

**Table 17: Responses of Region I ALJs to Survey Question on Timeliness of Evidence Submissions Under Five-Day Rule**

In your cases in the past year, about how often was all material written evidence timely submitted by claimants—that is, five (5) business days or more before hearings? <sup>300</sup>							
Answer Options	Almost Always	Frequently	Sometimes	Rarely	Almost Never	Rating Average	Response Count
Represented Claimants	18.5%	37.0%	18.5%	25.9%	0.0%	3.48	27
Unrepresented Claimants	11.1%	7.4%	29.6%	33.3%	18.5%	2.59	27

**Table 18: Responses of Region I HODs to Survey Question on Timeliness of Evidence Submissions Under Five-Day Rule**

In your office’s cases in the past year, about how often was all evidence timely submitted by claimants—that is, five (5) business days or more before hearings? If you do not know, please select "N/A" <sup>301</sup>								
Answer Options	Almost Always	Frequently	Sometimes	Rarely	Almost Never	N/A	Rating Average	Response Count
Represented Claimants	14.3%	28.6%	42.9%	14.3%	0.0%	0.0%	3.43	7
Unrepresented Claimants	0.0%	42.9%	28.6%	28.6%	0.0%	0.0%	3.14	7

<sup>298</sup> See ALJ Feb. 5 VTC Interview, *supra* note 255.

<sup>299</sup> See APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, Apps. E-3, Survey Response #7, at p. A-36; E-4, Survey Response #5, at p. A-56 (overall average of Region I ALJs and HODs reporting that represented claimants “sometimes,” “rarely” or “never” submitted all material evidence at least five days before hearings equal to 50.8%).

<sup>300</sup> See *id.* at App. E-1, Survey Response # 7, p. A-36.

<sup>301</sup> See *id.* at App. E-2, Survey Response # 5, p. A-56.

Understanding why representatives in Region I seek to submit evidence less than five days before the hearing is also important to assessing how evidentiary submission practices currently work. When surveyed, ALJs indicated that there are varying reasons offered by claimants’ representatives who submit evidence late.<sup>302</sup> However, one reason appears to be offered more often than others. Indeed, more than 80% of Region I ALJs surveyed report that representatives “almost always” or “frequently” state that they “recently received evidence from a medical provider or other source” as the reason for submitting evidence less than five business days before the hearing<sup>303</sup> (see Table 19 below).

**Table 19: Heat Map of Responses by Region I ALJs to Survey Question on Claimants’ Reasons For Submission of Evidence Less Than Five Days Before Hearing**

Listed below are some possible reasons why parties might seek to submit material written evidence less than five (5) business days before a hearing. For each statement listed below, please indicate how frequently it was used by CLAIMANTS’ REPRESENTATIVES in the past year as a basis for seeking to submit material written evidence less than five (5) business days before a hearing:<sup>304</sup>

Answer Options	Almost Always	Frequently	Sometimes	Rarely	Almost Never	N/A	Rating Average	Response Count
Did not know how to submit evidence	0.0%	0.0%	3.7%	7.4%	70.4%	18.5%	1.18	27
Recently received evidence from a medical provider or other source	18.5%	66.7%	14.8%	0.0%	0.0%	0.0%	4.04	27
Recently received evidence from claimant	3.7%	48.1%	29.6%	14.8%	3.7%	0.0%	3.33	27
Did not have enough time to submit evidence	0.0%	7.4%	25.9%	33.3%	29.6%	3.7%	2.12	27
An unusual or avoidable circumstance beyond his/her control	0.0%	7.4%	29.6%	33.3%	29.6%	0.0%	2.15	27
SSA’s notice/actions were misleading	0.0%	0.0%	0.0%	0.0%	70.4%	29.6%	1.00	27
Claimant’s physical, mental, educational or linguistic limitation prevented timely submission	0.0%	0.0%	22.2%	22.2%	44.4%	11.1%	1.75	27
No reason given	0.0%	18.5%	18.5%	7.4%	40.7%	14.8%	2.17	27

(Note: “Heat map” above shows graphical distribution of survey response values by color-coding higher response values with darker colors.)

<sup>302</sup> See *id.* at App. E-1, Survey Response # 9, p. A-37.

<sup>303</sup> See *id.*

<sup>304</sup> *Id.* at App. E-1, Survey Response # 9, p. A-37.



Similarly, when asked about the reasons why claimants’ representatives seek to submit evidence *after* a hearing has concluded, Region I ALJs’ responses varied. However, again, “recently received evidence from a medical provider or other source” was the most frequently cited reason<sup>305</sup> (*see* Table 20 below).

**Table 20: Responses by Region I ALJs to Survey Question on Claimants’ Representatives Reasons For Submission of Evidence Less Than Five Days Before Hearing**

Listed below are some possible reasons why parties might seek to submit material written evidence after a hearing has concluded. For each statement listed below, please indicate how frequently it was used by CLAIMANTS' REPRESENTATIVES in the past year as a basis for seeking to submit material written evidence after a hearing had concluded: <sup>306</sup>								
Answer Options	Almost Always	Frequently	Sometimes	Rarely	Almost Never	N/A	Rating Average	Response Count
Did not know how to submit evidence	0.0%	0.0%	0.0%	3.8%	69.2%	26.9%	1.05	26
Recently received evidence from a medical provider or other source	3.8%	50.0%	19.2%	11.5%	11.5%	3.8%	3.24	26
Recently received evidence from claimant	0.0%	26.9%	30.8%	7.7%	30.8%	3.8%	2.56	26
Did not have enough time to submit evidence	0.0%	3.8%	23.1%	19.2%	42.3%	11.5%	1.87	26
An unusual or avoidable circumstance beyond his/her control	0.0%	7.7%	38.5%	11.5%	38.5%	3.8%	2.16	26
SSA’s notice/actions were misleading	0.0%	0.0%	0.0%	11.5%	61.5%	26.9%	1.16	26
Claimant’s physical, mental, educational or linguistic limitation prevented timely submission	0.0%	3.8%	7.7%	23.1%	53.8%	11.5%	1.57	26
No reason given	11.5%	3.8%	7.7%	7.7%	42.3%	26.9%	2.11	26

(Note: “Heat map” above shows graphical distribution of survey response values by color-coding higher response values with darker colors.)

Region I ALJ survey responses regarding reasons why unrepresented claimants seek to submit evidence shortly before, at, or after a hearing vary, with many reporting the unrepresented

<sup>305</sup> See *id.* at App. E-1, Survey Response # 17, p. A-40.

<sup>306</sup> *Id.* at App. E-1, Survey Response # 17, p. A-40.

claimants “almost always” or “frequently” state that they were: (1) “not aware of the submission deadline;” (2) “recently received evidence from a medical provider or other source;” or (3) “did not know how to submit evidence” as reasons why they failed to timely submit evidence.<sup>307</sup> Notably, a sizable percentage of ALJs reported that unrepresented claimants “almost always” or “frequently” offer no reason for seeking to submit evidence shortly before, at, or after a hearing.<sup>308</sup> Tables 21 and 22 below illustrate the varying reasons provided by unrepresented claimants for submitting evidence less than five days before, at, or after a hearing.

**Table 21: Heat Map of Responses by Region I ALJs to Survey Question on Unrepresented Claimants’ Reasons For Submission of Evidence Less Than Five Days Before Hearing**

**Question to Region I ALJs:** Listed below are some possible reasons why parties might seek to submit material written evidence less than five (5) business days before a hearing. For each statement listed below, please indicate how frequently it was used by UNREPRESENTED CLAIMANTS in the past year as a basis for submitting material written evidence less than five (5) business days before a hearing:<sup>309</sup>

Answer Options	Almost Always	Frequently	Sometimes	Rarely	Almost Never	N/A	Rating Average	Response Count
Did not know how to submit evidence	7.7%	23.1%	19.2%	11.5%	23.1%	15.4%	2.77	26
Recently received evidence from a medical provider or other source	3.8%	38.5%	23.1%	3.8%	15.4%	15.4%	3.14	26
Did not have enough time to submit evidence	3.8%	0.0%	26.9%	26.9%	30.8%	11.5%	2.09	26
A physical, mental, educational or linguistic limitation prevented him/her from timely submitting evidence	0.0%	11.5%	26.9%	19.2%	26.9%	15.4%	2.27	26
An unusual or avoidable circumstance beyond his/her control	0.0%	3.8%	38.5%	15.4%	26.9%	15.4%	2.23	26
SSA’s notice/actions were misleading	0.0%	0.0%	19.2%	23.1%	38.5%	19.2%	1.76	26
Was not aware of submission deadline	7.7%	34.6%	11.5%	11.5%	23.1%	11.5%	2.91	26
No reason given	3.8%	19.2%	23.1%	7.7%	26.9%	19.2%	2.57	26

(Note: “Heat map” above shows graphical distribution of survey response values by color-coding higher response values with darker colors.)

<sup>307</sup> See *id.* at Apps. E-1, Survey Response # 12, p. A-38; E-1, Survey Response # 20, p. A-41.

<sup>308</sup> See *id.* at Apps. E-1, Survey Response # 12, p. A-38; E-1, Survey Response # 20, p. A-41.

<sup>309</sup> See *id.* at App. E-1, Survey Response # 12, p. A-38.

**Table 22: Heat Map of Responses by Region I ALJs to Survey Question on Unrepresented Claimants’ Reasons for Submission of Evidence After the Hearing**

Listed below are some possible reasons why parties might seek to submit material written evidence after a hearing has concluded. For each statement listed below, please indicate how frequently it was used by UNREPRESENTED CLAIMANTS in the past year as a basis for submitting material written evidence after a hearing had concluded:<sup>310</sup>

Answer Options	Almost Always	Frequently	Sometimes	Rarely	Almost Never	N/A	Rating Average	Response Count
Did not know how to submit evidence	3.8%	23.1%	15.4%	11.5%	26.9%	19.2%	2.57	26
Recently received evidence from a medical provider or other source	3.8%	34.6%	26.9%	7.7%	15.4%	11.5%	3.04	26
Did not have enough time to submit evidence	0.0%	3.8%	30.8%	19.2%	30.8%	15.4%	2.09	26
A physical, mental, educational or linguistic limitation prevented him/her from timely submitting evidence	0.0%	11.5%	26.9%	15.4%	30.8%	15.4%	2.23	26
An unusual or avoidable circumstance beyond his/her control	0.0%	0.0%	34.6%	15.4%	30.8%	19.2%	2.05	26
SSA’s notice/actions were misleading	0.0%	3.8%	7.7%	19.2%	38.5%	30.8%	1.67	26
Was not aware of submission deadline	7.7%	30.8%	11.5%	11.5%	19.2%	19.2%	2.95	26
No reason given	7.7%	7.7%	15.4%	7.7%	42.3%	19.2%	2.14	26

(Note: “Heat map” above shows graphical distribution of survey response values by color-coding higher response values with darker colors.)

Another key to assessing how the five-day rule affects evidentiary submission practices in Region I is the extent to which good cause exceptions are requested—and granted—as a means to admit late evidence that would otherwise have been excluded. Region I ALJs’ survey responses indicate that about 55% of the time represented claimants “almost always” or “frequently” seek to have untimely evidence admitted less than five days before hearings, and ALJs “almost always” or “frequently” grant such requests at about a 65% rate.<sup>311</sup> For unrepresented claimants, both the good-cause based request and grant rates in the period less than five days before the hearing were even higher.<sup>312</sup>

<sup>310</sup> See *id.* at App. E-1, Survey Response # 20, p. A-41.

<sup>311</sup> See *id.* at App. E-1, Survey Response # 8, p. A-37.

<sup>312</sup> See *id.* at Apps. E-1, Survey Response # 8, p. A-37; E-1, Survey Response # 15, p. A-39.

In contrast, fewer Region I ALJs (50%) reported that they “almost always” or “frequently” grant requests by claimants’ representatives to submit evidence *after* the hearing has concluded and similarly, only 72% reported the same when such requests are made by unrepresented claimants.<sup>313</sup> When ALJs grant requests to submit evidence *after* the hearing, they give claimants and/or representatives a designated amount of time to submit additional evidence. Region I ALJs reported giving varying timeframes for the submission of evidence after the hearing. Indeed, some ALJs give less than one week and others give more than one month.<sup>314</sup> The largest percentage of ALJs reported that they give both represented and unrepresented claimants two weeks to submit the evidence when they grant requests under the five-day rule’s good cause exception<sup>315</sup> (*see* Table 23 below).

**Table 23: Responses by Region I ALJs to Survey Question on Amount of Time Granted for Submission of Additional Evidence Under Good Cause Exception**

<b>Question to Region I ALJs: When you granted requests from claimants or their representatives to submit additional written evidence after the close of hearings under the good cause/materiality exception, about how much time did you typically give claimants or their representatives to submit additional written evidence?</b> <sup>316</sup>							
<b>Answer Options</b>	<b>Less than 1 Week</b>	<b>1 Week</b>	<b>2 Weeks</b>	<b>3 Weeks</b>	<b>More than 3 Weeks</b>	<b>Rating Average</b>	<b>Response Count</b>
Represented Claimants	4.5%	13.6%	68.2%	4.5%	9.1%	3.00	22
Unrepresented Claimants	0.0%	9.1%	36.4%	22.7%	31.8%	2.23	22

In many (though not all) respects, interviews with Region I ALJs echoed the foregoing survey results showing variation in evidentiary submission practices under the five-day rule. The majority of ALJs interviewed noted that, in hearing their offices (1) representatives often failed to timely submit evidence, and (2) judges frequently admitted late evidentiary submissions without inquiry as to whether such evidence fell within one of the good cause exceptions. Yet, on the other hand, other Region I ALJs whom we interviewed stated that the five-day rule was indeed applied in their offices—namely, that representatives regularly submitted evidence in a timely fashion, and, when they did not, judges admitted late evidence only when it met a good cause exception.

Interviews in Region I also revealed that not only did current practices vary across hearing offices, but also, on occasion, even within particular hearing offices.<sup>317</sup> For example, in Boston, we interviewed one senior ALJ holding a leadership position in Region I, who said that “[t]he rule is on the books and claimants’ representatives are aware of it so I believe they do regularly adhere to it.”<sup>318</sup> This ALJ stated her belief that, among Region I ALJs, the general consensus is that the five-day rule works well and that representatives regularly submit evidence

<sup>313</sup> *See id.* at App. E-1, Survey Response # 24, p. A-42.

<sup>314</sup> *See id.* at App. E-1, Survey Response # 25, p. A-42.

<sup>315</sup> *See id.*

<sup>316</sup> *Id.*

<sup>317</sup> *See* In-person, video teleconference, and telephone interviews with Region I ALJs (Feb. 4-5, 2013) [hereinafter Multiple Region I ALJ Feb. Interviews] (interview notes on file with authors).

<sup>318</sup> *See* ALJ Feb. 4 Interview, *supra* note 262.

five or more days before the hearing.<sup>319</sup> Other ALJs in the same hearing office expressed a different view. One ALJ in Boston, MA admitted that “[m]any judges in Region I review evidence submitted after the record closes anyway, although there are a few judges who enforce the five-day rule and exclude evidence unless it is relevant and falls under a good cause exception.”<sup>320</sup> Another ALJ in Boston, MA agreed, noting that ALJs in his office need to do a better job of enforcing the five-day rule by encouraging timely evidentiary submissions and by admitting evidence submitted late only if it meets a good cause exception. “If we do not enforce the rule aggressively, then we cannot expect representatives to adhere to it,” he said.<sup>321</sup>

Region I ALJs in other offices also spoke about varied practices under the rule and many we interviewed expressed frustration with the fact that claimants’ representatives still submit evidence late (i.e., shortly before, on the day of, or after a hearing), despite the fact that the five-day rule has been in effect throughout the region for more than five years.<sup>322</sup> For example, an ALJ in Manchester, NH asserted that ALJs in his office regularly admit untimely evidence without examining whether such evidence falls under a good cause exception.<sup>323</sup> Another ALJ in Lawrenceville, MA noted that, in his office, many representatives do not currently follow the five-day rule and regularly submit untimely evidence.<sup>324</sup> He stated that the agency needs to better enforce the rule by admitting untimely evidence only if it falls under a good cause exception in order to ensure that people follow it.<sup>325</sup>

Additionally, a number of ALJs with whom we spoke expressed concern about the ways in which untimely evidence affected cases and processing times. A number of ALJs noted that, when the record requires further development after the hearing, they must put the case into post-hearing status.<sup>326</sup> One ALJ who works in Boston, MA stated that putting cases into post-hearing status undermined adjudicatory efficiency.<sup>327</sup> This ALJ also noted that, although cases typically stay in such status for less than 30 days, the fact that so many cases have to be put into post-hearing status is problematic and shows that the five-day rule is not being followed with consistency.<sup>328</sup> The ALJ stated that accordingly, judges are unable to properly consider evidence prior to the hearing as the rule intends for them to do.<sup>329</sup> Another ALJ—in Portland, ME—noted that when late evidentiary submissions occur, he may have to schedule a supplemental hearing

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<sup>319</sup> *See id.*

<sup>320</sup> *See* ALJ Feb. 5 Interview, *supra* note 261.

<sup>321</sup> *See* ALJ Feb. 4 Interview, *supra* note 262.

<sup>322</sup> *See* Multiple Region I ALJ Feb. Interviews, *supra* note 309.

<sup>323</sup> *See* ALJ Feb. 4 VTC Interview, *supra* note 254.

<sup>324</sup> *See* ALJ Feb. 5 VTC Interview, *supra* note 255.

<sup>325</sup> *See id.*

<sup>326</sup> *See id.* Also note that although some at SSA have argued that having a five-day rule should lead to less Region I cases being put into post-hearing status because the rule encourages timely submission of evidence before the hearing, thereby reducing the number of cases that need to be developed after the hearing while awaiting the submission of additional evidence after the hearing, this argument has not been supported by the agency-provided data available. As discussed *supra* Pt. III.A, there is no real difference in the amount of cases that have post-hearing status in Region I than in comparable Regions VII and VIII. Admittedly, the mere fact that the data do not show a difference in the number of cases being put into post-hearing status is inconclusive. The lack of a difference may be attributable, at least in part, to the fact that the five-day rule is not being enforced consistently in Region I. For a summary of the agency-provided data and an empirical analysis of that data see *supra* Part III.A.

<sup>327</sup> *See* ALJ Feb. 5 Interview, *supra* note 261.

<sup>328</sup> *See id.*

<sup>329</sup> *Id.*

after the evidence has been submitted in order to further consider a case. He stated that scheduling supplemental hearings can often lead to delay in issuing a decision.<sup>330</sup> Some ALJs we interviewed also expressed concern that, in their view, some representatives—despite the five-day rule—intentionally withhold evidence at the hearing level in order to present it for the first time when the case is on appeal. For example, one ALJ in Lawrenceville, MA stated that he has not personally witnessed any intentional withholding of evidence in his cases, but has heard from other ALJs that this occasionally happens.<sup>331</sup>

Yet, while many Region I ALJs voiced concerns about consistent application (and compliance with) the five day rule, other judges with whom we spoke stated that the five-day rule was indeed applied with regularity in their offices—namely, that representatives regularly submitted evidence in a timely fashion, and, when they did not, judges admitted late evidence only when it met a good cause exception.<sup>332</sup> For example, one ALJ in Portland, ME noted that she does not admit untimely evidence into the record unless it meets a good cause exception, and that representatives who appear before her generally submit evidence in a timely manner.<sup>333</sup> However, the judge also noted that when representatives submit evidence late, she gives them a stern warning while generally admitting such evidence under a good cause exception.<sup>334</sup> Another judge in Portland, ME agreed, commenting that representatives in that community regularly follow the five-day rule by submitting evidence timely.<sup>335</sup> One ALJ in Hartford, CT recounted that, since the five-day rule has been in effect, more representatives who appear before him have submitted evidence in a timely fashion.<sup>336</sup> As well, an ALJ in Providence, RI noted that representatives in his office “begrudgingly” make timely evidentiary submissions under the five-day rule.<sup>337</sup> He noted that ALJs often have to cajole and threaten representatives to get them to submit evidence in a timely manner.<sup>338</sup> This ALJ also noted that until recently, judges in his office were reluctant to enforce the rule to exclude late evidentiary submissions that also do not meet one of the good cause exceptions largely because they felt it would unfairly disadvantage the claimant.<sup>339</sup> However, starting in January 2013, judges in the Providence, RI hearing office began regularly applying the rule and excluding late evidence unless it met a good cause exception.<sup>340</sup> Because hearing office practice had been inconsistent up until this point, the Providence, RI office now makes it a priority to try to get claimants and their representatives to timely submit evidence under the rule by informing representatives in the area that the office will regularly enforce the rule and by posting a notice about the rule in the office.<sup>341</sup> Those ALJs who reported enforcing the rule, also believed that the five-day rule has reduced the intentional withholding of evidence, to the extent it was previously being done. As one ALJ in Portland, ME explained: “Closing the record has cut down on the withholding of records by

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<sup>330</sup> See ALJ Feb. 4 VTC Interview, *supra* note 254.

<sup>331</sup> See *id.*

<sup>332</sup> See Multiple Region I ALJ Feb. Interviews, *supra* note 309.

<sup>333</sup> See ALJ Feb. 5 VTC Interview, *supra* note 255.

<sup>334</sup> See *id.*

<sup>335</sup> See *id.*

<sup>336</sup> See ALJ Feb. 4 VTC Interview, *supra* note 254.

<sup>337</sup> See ALJ Feb. 5 VTC Interview, *supra* note 255.

<sup>338</sup> See *id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

representatives who want to game the system so they can get a second chance at having their case reviewed on appeal.”<sup>342</sup>

The majority of ALJs we interviewed about current practices were from offices in Region I. However, we also interviewed ALJs at the National Hearing Center (“NHC”), who bring a unique perspective to understanding enforcement of, and adherence to, the five-day rule. These ALJs hear and adjudicate claims in Region I, where the five-day rule exists, as well as in other regions, where there is no five-day rule. One ALJ in a senior leadership position at the NHC noted that in the Region I cases she hears, disallowing untimely evidence can be difficult to do because sometimes, despite a representative’s best efforts, he or she just cannot obtain evidence from the claimant or medical provider prior to the hearing.<sup>343</sup> Other ALJs at the NHC stated that they do require evidence to be submitted five or more days before the hearing in the Region I cases that they hear, but most acknowledged that they also typically apply a good cause exception under the rule to admit any relevant evidence.<sup>344</sup>

Finally, hearing office staff in Region I—as with most ALJs—reported during interviews that there were inter-regional variations in evidentiary submission practices under the five-day rule.<sup>345</sup> Some staff members noted that representatives in Region I regularly submit untimely evidence and shared feelings of frustration with receiving late evidence shortly before or after a hearing. However, other staff reported that, since the five-day rule has been in effect, there has been a decline in the number of problems they encounter when handling evidentiary records. They reported (1) a reduction in the amount of duplicative evidence submitted, and (2) a decrease in the submissions of evidence shortly before, at, or after a hearing.

## **b. Current Practices in Regions II – X**

In assessing the impact of the Region I pilot program, it is also important to examine current practices regarding notices of hearing and the submission of evidence in the other SSA regions (i.e., Regions II-X). Since the majority of ALJs and hearing office staff members in Regions II-X support the pilot program and favor expansion of the 75-day notice requirement and the five-day rule,<sup>346</sup> identifying current practices in these regions may be important to understanding the support for expansion of the program nationwide. A summary of the current practices in Regions II-X is set forth below.

### Notices of Hearing

Current regulations in Regions II-X mandate that, absent written waiver by a claimant, notices of hearing must be issued not less than 20 days before the hearing date.<sup>347</sup> In practice,

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<sup>342</sup> See *id.*

<sup>343</sup> See In-person interview with ALJ (Feb. 12, 2013) (interview notes on file with authors).

<sup>344</sup> See *id.*

<sup>345</sup> See In-person and video teleconference interviews with Region I hearing office staff members (case technicians, decision writers, group supervisors and hearing office directors) (Feb. 4-5, 2013) (interview notes on file with authors). All information in this section was provided in these interviews.

<sup>346</sup> For a discussion of perspectives showing that a majority of ALJs and hearing office staff members support the Region I pilot program, see *supra* Pt. III.B.1.

<sup>347</sup> See 20 C.F.R. §§ 404.938, 416.1438 (2012).

however, hearing offices in these regions typically issue notices of hearing well in advance of this 20-day timeframe. Since 2005, the average time interval between notice and hearing date has risen substantially across all regions (albeit at a slower pace than Region I which, during this period, has had the 75-day notice requirement in effect).<sup>348</sup> Notably, in 2011 and 2012, the national average for the time interval between notice and hearing was 70 and 79 days respectively.<sup>349</sup> Nonetheless, survey and interview responses from Regions II-X show that there is a wide variation in notice of hearing practices across these regions. As set forth in Table 24 below, the majority of Regions II-X ALJs and HODs reported that their office issues notices 45 to 60 days in advance of a hearing.<sup>350</sup> However, notable exceptions exist outside this majority practice. Sizeable percentages of hearing offices are reported as issuing notices 30 or 90 days before the hearing. Moreover, a few hearing offices are said to be issuing notices on the far extremes of the hearing notice timeframe—that is, less than 30 days and more than 120 days before hearing dates.

**Table 24: Responses of Regions II-X ALJs/HODs to Survey Questions on Timing of Hearing Notices**

<b>In the past year, about how long before a hearing were notices of hearing typically sent by your office to claimants?<sup>351</sup></b>		
<b>Answer Options</b>	<b>ALJs</b>	<b>HODs</b>
A) Less than 30 days before the hearing	5.1%	1.6%
B) 30 days before the hearing	14.9%	21.1%
C) 45 days before the hearing	20.2%	23.6%
D) 60 days before the hearing	26.2%	35.8%
E) 90 days before the hearing	11.3%	15.4%
F) 120 days before the hearing	1.0%	1.6%
G) More than 120 days before the hearing	1.1%	0.8%
H) Don't Know/Not Sure	20.2%	0.0%

Interviews with ALJs and staff in Regions VII and VIII underscored this variability in notice of hearing practices.<sup>352</sup> Interviewees in these regions reported that practices relating to issuance of hearing notices vary depending on the office, with notices going out anywhere from 20 to 120 days in advance of the hearing date. In addition, some ALJs and staff members reported that the hearing notice practices may vary within the same office. For instance, one ALJ in Fargo, ND explained that notices in her office are sent out between 30 and 60 days before the hearing depending on the office's caseload and ALJ availability.<sup>353</sup>

<sup>348</sup> See APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, App. D, tbl. A-12 & fig. A-18; see also discussion *supra* Pt. III.A.

<sup>349</sup> *Id.*

<sup>350</sup> See APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, Apps. E-2, Survey Response # 3, at p. A-55; E-4, Survey Response # 3, at p. A-122.

<sup>351</sup> See *id.* at Apps. E-2, Survey Response # 3, at p. A-55; E-4, Survey Response # 3, at p. A-122.

<sup>352</sup> Video teleconference and telephone interviews with Region VII and VIII ALJs and hearing office staff members (case technicians, decision writers, group supervisors and hearing office directors) (Feb. 13-14, 2013) (interview notes on file with authors).

<sup>353</sup> See Video teleconference interview with ALJ (Feb. 12, 2013) (interview notes on file with authors).



*Submission of Evidence*

In Regions II-X, where there is no pilot program in force, our research found that claimants and representatives are much more likely to submit evidence later in the adjudication process. Across all regions, on average, the bulk of documents submitted in the 30-day period leading up to the hearing (or at or after the hearing), are submitted in the narrow window of time within five or less days before the hearing, at the hearing, or after the hearing.<sup>354</sup> This empirical finding is further buttressed by survey results from ALJs and HODs in Regions II-X. As set forth in Tables 26 and 27 below, survey respondents reported that, with respect to both represented claimants and unrepresented claimants, it is relatively rare for evidence to be submitted five days or more before the hearing. For example, only 20.5% of ALJs reported that, over the course of the past year, represented claimants “almost always” or “frequently” submit evidence at least five days prior to hearings. To put this figure in perspective, relative to survey results from ALJs in Region I, represented claimants in Regions II-X are about 63% less likely to consistently submit evidence five days or more before hearings.<sup>355</sup>

**Table 25: Responses by Regions II-X ALJs to Survey Question on Frequency of Claimants’ Submission of All Material Evidence Five Days Before Hearing**

In your cases in the past year, about how often was all material written evidence submitted by claimants at least five (5) business days before the hearing? <sup>356</sup>							
Answer Options	Almost Always	Frequently	Sometimes	Rarely	Almost Never	Rating Average	Response Count
Represented Claimants	3.7%	16.8%	34.7%	27.9%	16.9%	2.62	703
Unrepresented Claimants	2.6%	9.0%	18.6%	27.9%	42.0%	2.02	703

**Table 26: Responses by Regions II-X HODs to Survey Question on Frequency of Claimants’ Submission of All Material Evidence Five Days Before Hearing**

In your cases in the past year, about how often was all material written evidence submitted by claimants at least five (5) business days before the hearing? <sup>357</sup>							
Answer Options	Almost Always	Frequently	Sometimes	Rarely	Almost Never	Rating Average	Response Count
Represented Claimants	8.1%	27.6%	36.6%	16.2%	8.1%	3.12	123
Unrepresented Claimants	4.9%	16.2%	38.2%	22.8%	8.9%	2.84	123

<sup>354</sup> See APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, at App. D, tbl. A-11, figs. A-15, A-16 & A-17, pp. A-27 to A-29. As noted previously, see discussion *supra* Pt. III.A, Region I’s profile concerning the volume and timing of evidentiary submissions varies considerably from the national average, with a greater percentage of documents submitted farther in advance of the hearing date.

<sup>355</sup> This figure was obtained by comparing the percentage of ALJs in Region I and Regions II-X respectively who reported in survey responses that represented claimants “almost always” or “frequently” submit evidence five days or more before hearings. Compare APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, Apps. E-1, Survey Response # 7, at p. A-36 with *id.* at App. E-3, Survey Response # 5, at p. A-56.

<sup>356</sup> See *id.* at App. E-3, Survey Response # 7, p. A-68.

<sup>357</sup> See *id.* at App. E-4, Survey Response # 5, p. A-123.

These survey results thus demonstrate that in Regions II-X—where there is no five-day rule—evidence submission occurs closer to the hearing (or later). Indeed, a number of ALJs in these regions expressed frustration with late submissions of evidence. One ALJ from Region III noted his frustration in these terms: “Problems with late submission of evidence [are] the number one factor preventing me from doing a better job adjudicating and moving cases in a timely manner.”<sup>358</sup> Another ALJ commented: “[L]ate submission of evidence is a constant problem [and it creates] inefficiencies in the hearing process.”<sup>359</sup> And, lastly, as one ALJ from Region IX put it: “Not closing the record prior to the hearing creates a chaotic process.”<sup>360</sup>

There are many reasons why representatives might submit evidence shortly before or at a hearing. When surveyed, ALJs in Regions II-X reported a number of different explanations from representatives why they were submitting evidence less than five days before the hearing.<sup>361</sup> As shown in Table 27, a top reason was “recently received evidence from a medical provider or other source,” which mirrors the survey responses of ALJs in Region I.<sup>362</sup> Other reasons offered by representatives, along with their relative frequencies, are shown in Table 27 below. Notably, 49% of ALJs reported that representatives “almost always” or “frequently” submit evidence less than five days before the hearing without giving any reason<sup>363</sup>—a frequency that is nearly twice as high as the “no reason given” percentage reported by ALJs in Region I.<sup>364</sup>

**Table 27: Heat Map of Responses by Regions II-X ALJs to Survey Question on Reasons by Claimants’ Representatives for Submission of Evidence Less Than Five Days Before Hearing**

<b>Question to Region II-X ALJs:</b> Listed below are some possible reasons for submitting material written evidence less than five (5) business days before a hearing. For each statement listed below, please indicate how frequently it was used by CLAIMANTS’ REPRESENTATIVES in the past year as a basis for submitting material written evidence less than five (5) business days before a hearing: <sup>365</sup>								
Answer Options	Almost Always	Frequently	Sometimes	Rarely	Almost Never	N/A	Rating Average	Response Count
Did not know how to submit evidence	0.4%	0.7%	1.3%	7.4%	68.5%	21.6%	1.18	699
Recently received evidence from a medical provider or other source	24.5%	55.1%	17.0%	2.0%	1.1%	0.3%	4.00	699
Recently received evidence from	13.4%	43.9%	29.9%	7.9%	4.1%	0.7%	3.55	699

<sup>358</sup> See *id.* at App. E-3, Survey Response # 27-114, p. A-92.

<sup>359</sup> See *id.* at App. E-3, Survey Response # 27-218, p. A-107.

<sup>360</sup> See *id.* at App. E-1, Survey Response # 27-142, p. A-98.

<sup>361</sup> For survey responses from ALJs in Regions II-X concerning the reasons given by represented claimants for post-hearing evidentiary submissions, see *id.* at App. E-3, Survey Response # 15, p. A-71. Reasons given by representatives for submission of evidence less than five days before hearings, as compared to post-hearing, are largely similar.

<sup>362</sup> See *id.* at App. E-3, Survey Response # 11, pp. A-69 & A-70; see also App. E-1, Survey Response # 9, at A-37.

<sup>363</sup> See *id.* at App. E-3, Survey Response # 11, pp. A-69 & A-70.

<sup>364</sup> See *id.* at App. E-1, Survey Response # 17, p. A-40.

<sup>365</sup> See *id.* at App. E-3, Survey Response # 11, pp. A-69 & A-70.

**Question to Region II-X ALJs:** Listed below are some possible reasons for submitting material written evidence less than five (5) business days before a hearing. For each statement listed below, please indicate how frequently it was used by CLAIMANTS' REPRESENTATIVES in the past year as a basis for submitting material written evidence less than five (5) business days before a hearing:<sup>365</sup>

claimant								
Did not have enough time to submit evidence	2.4%	8.3%	18.6%	24.3%	39.9%	6.4%	2.03	699
An unusual or avoidable circumstance beyond his/her control	2.1%	8.9%	19.5%	27.5%	37.2%	4.9%	2.07	699
SSA's notice/actions were misleading	0.1%	0.1%	0.7%	3.9%	67.2%	27.9%	1.09	699
Claimant's physical, mental, educational or linguistic limitation prevented timely submission	0.3%	0.7%	8.4%	18.9%	58.9%	12.7%	1.45	699
No reason given	13.4%	36.3%	22.2%	8.7%	13.0%	6.3%	3.30	699
Other/Not listed above	2.7%	5.7%	10.0%	5.0%	16.9%	59.7%	2.32	699

(Note: "Heat map" above shows graphical distribution of survey response values by color-coding higher response values with darker colors.)

Survey responses from ALJs in Regions II-X relating to unrepresented claimants' explanations for submission of evidence close to the hearing (i.e., less than five days) largely track those for represented claimants, with two notable exceptions. Table 28 below sets forth the ALJs' survey responses for why unrepresented claimants submit evidence shortly before hearings. As with represented claimants, ALJs report that the top reason given by unrepresented claimants for submission of evidence later in the adjudicatory process is that they "recently received evidence from a medical provider or other source."<sup>366</sup> Unrepresented claimants, however, are more likely to state that they "did not know how to submit evidence" or were "not aware of the submission deadline" as compared to represented parties.<sup>367</sup>

<sup>366</sup> See *id.* at App. E-3, Survey Response # 12, p. A-70. For survey responses from ALJs in Regions II-X concerning unrepresented claimants' explanations for post-hearing evidentiary submissions, see *id.* at App. E-3, Survey Response # 16, p. A-72. Reasons given by unrepresented claimants for submission of evidence less than five days before the hearing and after the hearing are largely similar.

<sup>367</sup> *Id.*

**Table 28: Heat Map of Responses by Regions II-X ALJs to Survey Question on Reasons by Unrepresented Claimants for Submission of Evidence Less Than Five Days Before Hearing**

Listed below are some possible reasons for submitting material written evidence less than five (5) business days before a hearing. For each statement listed below, please indicate how frequently it was used by UNREPRESENTED CLAIMANTS in the past year as a basis for submitting material written evidence less than five (5) business days before a hearing:<sup>368</sup>

Answer Options	Almost Always	Frequently	Sometimes	Rarely	Almost Never	N/A	Rating Average	Response Count
Did not know how to submit evidence	10.4%	23.1%	29.3%	6.7%	20.5%	10.0%	2.96	689
Recently received evidence from a medical provider or other source	5.7%	29.0%	35.0%	11.3%	13.1%	6.0%	3.03	689
Did not have enough time to submit evidence	1.3%	8.3%	16.0%	20.2%	39.9%	14.4%	1.96	689
A physical, mental, educational or linguistic limitation prevented him/her from timely submitting evidence	1.0%	6.1%	21.6%	21.3%	37.4%	12.5%	1.99	689
An unusual or avoidable circumstance beyond his/her control	1.6%	6.1%	19.2%	21.2%	39.3%	12.6%	1.96	689
SSA's notice/actions were misleading	0.6%	2.8%	6.8%	14.5%	52.2%	23.1%	1.50	689
Was not aware of submission deadline	10.6%	15.8%	17.0%	9.3%	27.6%	19.7%	2.66	689
No reason given	24.2%	35.0%	18.3%	3.8%	10.9%	7.8%	3.63	689
Other/Not listed above	4.1%	6.0%	7.4%	5.4%	17.1%	60.1%	2.36	689

(Note: “Heat map” above shows graphical distribution of survey response values by color-coding higher response values with darker colors.)

Interview responses from ALJs and hearing office staff in Regions II-X also show that there are variations in current evidentiary submission practices in these regions. The majority of ALJs and staff that we interviewed in these regions reported that, since they do not have any existing requirements similar to the five-day rule, both represented and unrepresented claimants submit evidence at varying stages of the process, including before the hearing, on the day of the hearing, during the hearing, or after the hearing.<sup>369</sup> Many ALJs we interviewed noted that

<sup>368</sup> See *id.* at App. E-3, Survey Response # 12, p. A-70.

<sup>369</sup> See Video teleconference and telephone interviews with Region VII and VIII ALJs and hearing office staff (case technicians, decision writers, group supervisors and hearing office directors) (Feb. 13-14, 2013) (interview notes on file with authors).

evidence submitted shortly before, at, or after a hearing can cause delays in the hearing process because they may have to reschedule hearings, schedule supplemental hearings to review additional evidence, and/or schedule consultative examinations to further develop the record.<sup>370</sup> ALJs also noted that untimely submission of evidence places additional burdens on their workloads and schedules.<sup>371</sup> Additionally, ALJs and staff members asserted that late evidence submissions unfairly burden hearing office staff because they then have to compile the evidentiary records at the last minute or sort through duplicative evidence.<sup>372</sup>

### **c. Current Practices Regarding Obtaining Medical Records**

As evidenced in the survey and interview responses collected for this report, medical records are at the heart of Social Security disability claims. Indeed, the timely collection and submission of relevant medical evidence from providers, such as physicians and psychologists, are key to the SSA process for deciding whether claimants have impairments that qualify them to receive disability benefits. Accordingly, evaluating the ability to timely obtain medical records is critical in assessing the impact of SSA's Region I pilot program. This section sets forth both obstacles to obtaining medical records, as well as some of the technological advances which may address these challenges.

#### *Issues with Obtaining Medical Records and Their Impact on SSA's Region I Pilot Program*

The ability of claimants to request and receive medical records in a timely fashion likely directly impacts enforcement of and adherence to the five-day rule. Indeed, unless claimants can request and receive medical records in a timely fashion, no closing the record rule can be consistently adhered to or fairly enforced. Timely receipt of evidence presents an obstacle because, as noted by many people interviewed for this report (including SSA staff and claimants' representatives), medical providers responsible for responding to requests for medical records are often busy and understaffed.<sup>373</sup> Accordingly, some medical providers take substantial amounts of time to fulfill requests for records or send incomplete responses to records requests.<sup>374</sup> Indeed, despite the fact that medical records are such a critical part of the SSA's hearing process, obtaining timely and complete medical records can be challenging and can cause delays in the process of collecting and finalizing an evidentiary record for review.<sup>375</sup> The current process for requesting and gathering medical records is cumbersome and is the most frequent source of delay in the disability determination process.<sup>376</sup> The ability to timely obtain medical evidence is also affected by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), which defines the circumstances in which an individual's health information may be used or

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<sup>370</sup> *See id.*

<sup>371</sup> *See id.*

<sup>372</sup> *See id.*

<sup>373</sup> A 2008 Government Accountability Office ("GAO") report noted challenges SSA faces in obtaining medical records from claimants' medical care providers, and how those challenges cause delay in the hearing process. *See generally* "Social Security Administration: Collection of Medical Evidence Could be Improved with Evaluations to Identify Promising Collection Practices," Report No. GAO-09-149, (2008), *available at* <http://www.gao.gov/assets/290/284422.pdf>.

<sup>374</sup> *See id.* at 13-19.

<sup>375</sup> *See id.*

<sup>376</sup> *See id.*

disclosed.<sup>377</sup> HIPAA's security provisions require entities that hold or transmit health information to maintain reasonable safeguards to protect the information against unauthorized use or disclosure, as well as ensure its integrity and confidentiality.<sup>378</sup> Complying with HIPPA requirements can potentially cause medical providers to take additional time to fulfill requests, resulting in delays of the transmission of medical records to SSA. These delays, in turn, may affect compliance with and enforcement of a rule closing the record in advance of the hearing when untimely evidence fails to meet a good cause exception.<sup>379</sup>

### *Use of Technological Advances to Address Issues with Obtaining Medical Records*

Given that issues with obtaining medical records may often be a reason for submitting evidence shortly before or even after a hearing, SSA may want to consider addressing ways to improve access to medical records. Such improvement would ensure better compliance with and enforcement of the five-day rule. To address the issue of obtaining medical records, SSA has made some progress by moving to electronic collection of medical records. However, the agency still faces challenges in fully implementing electronic submission, retrieval, and analysis of medical evidence.<sup>380</sup>

To improve and expedite the collection of medical records, SSA has recently launched its Health Information Technology ("HIT") program, which allows the agency to electronically obtain a complete medical record from a claimant who applies for disability benefits. The program allows for the electronic transmission of records, substantially shortening the amount of time needed to obtain records.<sup>381</sup> The agency believes that electronic records transmission will make it easier for claimants to timely submit evidence and thus reduce delays in the hearing process. However, the agency faces challenges to encouraging medical providers to use the HIT program.<sup>382</sup> Currently, only 1.7% of all SSA cases involve providers who participate in the program.<sup>383</sup> The HIT program is slowly expanding and in the next FY, the agency projects that 2.3% of all SSA cases will involve providers who participate in it.<sup>384</sup> With the expansion of the HIT program and other technological advances in electronic medical records, the agency is hopeful that medical records will be easier to obtain in the future than they have been in the past.<sup>385</sup> If medical records become easier to obtain, a major barrier to compliance with and enforcement of rules which close the evidentiary record would be removed.

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<sup>377</sup> *See id.*

<sup>378</sup> *See id.*

<sup>379</sup> *See id.*

<sup>380</sup> *See id.*

<sup>381</sup> *See* Health IT Initiative Fact Sheet, *available at* <http://www.ssa.gov/hit/our-initiative.html> (last visited June 15, 2013).

<sup>382</sup> *See* Telephone interview with SSA Health IT Program official (Mar.30, 2013) (interview notes on file with authors).

<sup>383</sup> *See id.*

<sup>384</sup> *See id.*

<sup>385</sup> Also note that in SSA's Unified Agenda, the agency has referred to its plans for continued expansion of the HIT program. *See* SSA: Obtaining Evidence Beyond the Current "Special Arrangement Services" (37611), RIN: 0960-AH44, Spring 2013, *available at* <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201304&RIN=0960-AH44>.

## C. Views of Third Party Organizations on Region I Pilot Program

### 1. Administrative Law Judge Organizations

In order to obtain a more complete view of the impact of the pilot program in Region I, we contacted ALJ organizations, namely the AALJ<sup>386</sup> and the Federal Administrative Law Judges Conference (“FALJC”).<sup>387</sup> We sent questions to the organizations<sup>388</sup> and after receiving their responses, conducted follow-up interviews with their members.

#### a. Association of Administrative Law Judges

Although the AALJ did not provide an official union position, it responded with the perspectives of several Region I ALJs active in the union, including the AALJ Region I Vice President.<sup>389</sup> The perspectives were varied. One AALJ member described the five-day rule as a useful tool, though infrequently enforced by ALJs.<sup>390</sup> He said that the rule minimizes, rather than eliminates the problems arising from the late submission of evidence.<sup>391</sup> Another AALJ member strongly supported the five-day rule as a regulation that “promotes the fair and orderly adjudication of claims, consistent with the requirements of due process.”<sup>392</sup> He went on to say that it accomplishes this feat without an increased burden on the taxpayer, while decreasing administrative burdens.<sup>393</sup> He asserted that it improves both teamwork and standardization between staff and ALJs, as well as advocacy by claimants’ representatives, and allows for adequate review of the record and preparation for the hearing.<sup>394</sup> In fact, he stated that the rule has permitted his office, where staff levels have decreased, to keep up with the processing of cases.<sup>395</sup> He believed that the burden that used to exist on staff and witnesses has been alleviated by the rule.<sup>396</sup> However, as strongly as this AALJ member affirmed the five-day rule, another

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<sup>386</sup> The AALJ was founded in 1971 as a professional organization. It became the SSA ALJ union in 1999; currently its membership includes 80% of SSA ALJs. See <http://www.aalj.org/mission-history> (last visited May 19, 2013).

<sup>387</sup> The FALJC is a professional organization that represents the interests of ALJs across the federal government. See <http://www.faljc.org/membership/> (last visited May 19, 2013).

<sup>388</sup> The responses we received from the ALJ organizations are included in the appendix. See APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, at Apps. F & G, pp. A-133 to A-139.

<sup>389</sup> See E-mail from AALJ Pres., to Amber Williams, Att’y Advisor, Admin. Conference of the U.S. (May 14, 2013) (on file with authors) [hereinafter AALJ Response 1]; E-mail from AALJ Vice Pres., to Amber Williams, Att’y Advisor, Admin. Conference of the U.S. (May 15, 2013) (on file with authors) [hereinafter AALJ Response 2]; E-mail from AALJ Local Rep., to Amber Williams, Att’y Advisor, Admin. Conference of the U.S. (May 15, 2013) (on file with authors) [hereinafter AALJ Response 3].

<sup>390</sup> See AALJ Response 1, *supra* note 389.

<sup>391</sup> See *id.* This ALJ advocated for SSA to adopt federal court practices for the submission of evidence. See *id.* He believed that representatives should bring the file up-to-date immediately after accepting representation. See *id.* He also believed that representatives should certify that the record “is current every 30 days prior to the hearing date.” See *id.*; see also Telephone interview with AALJ Representatives from Region I (May 16, 2013) (interview notes on file with authors) [hereinafter AALJ Interview].

<sup>392</sup> AALJ Response 3, *supra* note 389. He also noted that in his office, the 5-day rule is consistently applied. See *id.* He himself routinely applies both the rule and its exceptions. See *id.* He noted that some exceptions include: “new evidence created within two weeks of the hearing date, illness of the representative, and recalcitrant medical providers who refuse to provide treatment notes.” *Id.*

<sup>393</sup> See *id.*

<sup>394</sup> See *id.*

<sup>395</sup> See AALJ Interview, *supra* note 391.

<sup>396</sup> See *id.*

AALJ member just as strongly opposed it.<sup>397</sup> He believed that the regulation “creates extra work in trying to justify non-consideration as a procedural matter when it is simple to consider the evidence.”<sup>398</sup> He called the regulation “a nightmare for the staff,”<sup>399</sup> and said there is a lack of an agency-approved procedure on how to process the evidence. He believed that both the five-day rule and the reopening regulations violate both the Administrative Procedure Act and the Equal Protection Clause.<sup>400</sup>

As to the 75-day notice requirement, one AALJ member did not believe it significantly benefits representatives, since they routinely submit evidence based on their own circumstances and schedules.<sup>401</sup> He thought that a superior method of ensuring that evidence is brought up-to-date would be to require that the record be updated on a regular, periodic basis.<sup>402</sup> Another AALJ member disagreed by noting that sending out advance notice—75 to 100 days before the hearing date—has given representatives adequate time to submit evidence five days before the hearing date, resulting in a dramatic decrease in the late submission of evidence.<sup>403</sup> Yet another AALJ member believed that the 75-day notice requirement, rather than creating a boon for administrative efficiency, resulted in added hindrance because representatives “can refuse reschedules or not agree to hearing times.”<sup>404</sup> This AALJ member experienced as many hearing postponements under the 75-day notice requirement as he did under the 20-day notice requirement.<sup>405</sup> He shared that when he tries to fill the gaps in his schedule created by hearings that have been postponed, representatives often will not agree to less notice, even though that notice is given more than 20 days—the regulatory standard in other regions—in advance.<sup>406</sup>

Regarding the pilot program overall, one AALJ member emphasized the importance of not only having rules, but also enforcing those rules.<sup>407</sup> He lamented “the absence of meaningful sanctions to enforce the procedural rules[, stating that h]aving rules without the ability to enforce them is a meaningless exercise.”<sup>408</sup> He believed that the pilot program in Region I should be continued, but modified to facilitate better development of the record, as well as a judge’s “ability to regulate the timely submission of evidence.”<sup>409</sup> This AALJ member also expressed concern that the district court and Appeals Council would not uphold the ALJ’s decision to prohibit evidence from being included in the record.<sup>410</sup> Another AALJ member, whose office consistently applied the rules, praised the program.<sup>411</sup> He both maintained that the program is

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<sup>397</sup> See *id.* Another ALJ characterized the way things used to be prior to the pilot program as “inefficient” and a “nightmare.” *Id.*

<sup>398</sup> AALJ Response 2, *supra* note 389.

<sup>399</sup> See *id.*

<sup>400</sup> See *id.*

<sup>401</sup> See AALJ Response 1, *supra* note 389.

<sup>402</sup> See *id.*; see also AALJ Interview, *supra* note 391 for a description of the process he envisions.

<sup>403</sup> See AALJ Response 3, *supra* note 389.

<sup>404</sup> AALJ Response 2, *supra* note 389.

<sup>405</sup> See *id.*

<sup>406</sup> See *id.*

<sup>407</sup> See AALJ Response 1, *supra* note 389.

<sup>408</sup> See *id.*

<sup>409</sup> See *id.*

<sup>410</sup> See AALJ Interview, *supra* note 391. Another ALJ stated that his decisions to keep out evidence have been upheld by both the Appeals Council and district courts. See *id.*

<sup>411</sup> See AALJ Response 3, *supra* note 389.



not “anti-claimant,” and also professed that not enforcing the program actually “has a deleterious effect not only on the adjudication of the instant claim, but on every succeeding claim.”<sup>412</sup> While he approved of the program, he recommended clarification of the rules, believing that the five-day rule conflicted with keeping the record open.<sup>413</sup> Still another AALJ member held a low view of the pilot program, indicating that it not only did not benefit him, but actually worked against the claimant.<sup>414</sup> He cited the ALJ’s “duty to fully and fairly and impartially develop the record,”<sup>415</sup> and said that excluding evidence just because the representative did not timely submit it does not comport with the ALJ’s duty.<sup>416</sup> All of the AALJ members agreed that the rules should be consistent nationwide; most of them believed that the pilot program’s rules should be adopted by the rest of the country.<sup>417</sup>

### **b. Federal Administrative Law Judges Conference**

The FALJC viewed the Region I pilot program more expansively than just involving the 75-day notice requirement and five-day rule, and stated its perspective on the program from the DDS level through the full administrative appeals process. The organization approved of the 75-day notice requirement, as well as the five-day rule, but expressed grave concern regarding the front end of the process.<sup>418</sup> It maintained that inconsistent record development standards and payment rates exist among the different states.<sup>419</sup> Moreover, the organization believed that cases are not fungible—for example, in some areas, case files are thick and in other areas, thin.<sup>420</sup> Likewise, it asserted that some areas have talented and dedicated representatives, while other areas lack adequate representation.<sup>421</sup> Further, the organization stated that Appeals Council adjudication results in inconsistent decisions.<sup>422</sup> To help make the process better, the FALJC suggested that a project

be initiated for claims likely to go to step 5 of the sequential evaluation, [at which time] the burden of proof shifts from a claimant to the agency to show that there are a significant number of jobs in the national or regional economy that may be performed given the [residual functional capacity] RFC.<sup>423</sup>

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<sup>412</sup> *See id.*

<sup>413</sup> *See* AALJ Interview, *supra* note 391.

<sup>414</sup> *See* AALJ Response 2, *supra* note 389.

<sup>415</sup> *See id.*

<sup>416</sup> *See id.*

<sup>417</sup> *See* AALJ Interview, *supra* note 391.

<sup>418</sup> *See* Telephone interview with FALJC Representative (May 16, 2013) (interview notes on file with authors) [hereinafter FALJC Interview].

<sup>419</sup> *See id.* This fact is compounded by the existence of prototype and non-prototype states; *see also* Letter from FALJC Pres., to Amber Williams, Att’y Advisor, Admin. Conference of the U.S. (May 13, 2013) (on file with authors) [hereinafter FALJC Response].

<sup>420</sup> *See* FALJC Interview, *supra* note 418.

<sup>421</sup> *See id.*

<sup>422</sup> *See id.*

<sup>423</sup> FALJC Response, *supra* note 419. The FALJC also recommended that ALJs serve on the appellate board on a revolving basis. *See id.* In addition, the FALJC advocated focusing on conducting Continuing Disability Reviews and spending the funds realized on vocational rehabilitation. *See id.* The organization asserted that “SSA would get hundreds, if not thousands back for each dollar spent.” *See id.* Thus, the FALJC believed, fewer claims will be adjudicated, fixing “the SSDI Trust Fund solvency problem.” *See id.*

The FALJC believed the pilot program should be expanded to “at least one other region . . . with much lower rates of payment at the DDS level.”<sup>424</sup> The organization asserted that currently SSA does not have enough information to be able to properly compare the results in the pilot program with other regions.<sup>425</sup> It maintained that testing the pilot in another region is essential to establishing a point of reference.<sup>426</sup> The organization suggested establishing a pilot program in part of Region IV—since it is much more rural than Region I—for a couple of years.<sup>427</sup> By establishing the pilot in two regions that are different from each other in important ways, the FALJC believed that SSA would have the data it needs to determine whether to implement the program nationwide.<sup>428</sup>

## **2. Claimant Representative Organizations**

Just as we believed contacting ALJ organizations necessary to obtain a complete view of the impact of the Region I pilot program, we believed contacting claimants’ representative organizations to obtain their views would also be invaluable to our study. To that end, we contacted NOSSCR<sup>429</sup> and the National Association of Disability Representatives (“NADR”).<sup>430</sup> We sent them questions<sup>431</sup> and after receiving their responses, interviewed representatives of the organizations.

### **a. National Organization of Social Security Claimants’ Representatives**

NOSSCR submitted its feedback by providing both a general overview of NOSSCR’s position on the current pilot program and specific comments from NOSSCR members in response to the questions we posed to the organization.<sup>432</sup> NOSSCR believed that the pilot program imposed limits on the record such that denials of benefits may be “based on an incomplete record.”<sup>433</sup> It believed that this result is diametrically opposed to the goal of the system: to make a determination based on a complete record.<sup>434</sup> Further, NOSSCR noted that the current pilot program does not make allowances for the many legitimate reasons—often outside of the control of claimants or their representatives—why evidence has not been submitted earlier.<sup>435</sup>

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<sup>424</sup> *See id.*

<sup>425</sup> *See id.*

<sup>426</sup> *See* FALJC Interview, *supra* note 418.

<sup>427</sup> *See id.*

<sup>428</sup> *See id.* The FALJC maintained the importance of including a prototype state in the portion of Region IV that is chosen in order to monitor and understand the effects on the program both when an opportunity for reconsideration at the DDS level exists and when it does not. *See id.*

<sup>429</sup> NOSSCR was founded in 1979 and “is an association of over 4,000 attorneys and other advocates who represent” SSDI and SSI claimants. *See* <http://www.nosscr.org/about-us> (last visited June 1, 2013).

<sup>430</sup> NADR was founded in 2000 and is an organization dedicated to representing “people who have Social Security related problems” across the nation. *See* <http://www.nadr.org/about-nadr/> (last visited June 1, 2013).

<sup>431</sup> The responses we received from the claimants’ representative organizations are included in the appendix. *See* APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, at Apps. H & I, pp. A-140 to A-162.

<sup>432</sup> *See* E-mail from NOSSCR Exec. Dir. & NOSSCR Dir. of Gov’t Affairs, to Amber Williams, Att’y Advisor, Admin. Conf. of the U.S. (May 1, 2013) (on file with authors) [hereinafter NOSSCR Response].

<sup>433</sup> *Id.*

<sup>434</sup> *See id.*

<sup>435</sup> *See id.*

NOSSCR provided a number of serious concerns regarding the five-day rule. First, it believed that the five-day rule runs contrary to the Social Security Act, which requires the Commissioner (and those to whom he or she has delegated decision-making authority) to make decisions “on the basis of evidence adduced at the hearing.”<sup>436</sup> By limiting evidence that may be considered at the hearing, the organization asserted that the ALJ is unable to make a decision based on all of the relevant evidence. Second, NOSSCR further believed that by limiting the evidence that may be considered at the hearing, the five-day rule vitiates the ALJ’s duty to develop the record.<sup>437</sup> Third, the organization asserted that the pilot program gives ALJs the power to violate claimants’ rights.<sup>438</sup> NOSSCR noted that ALJs have discretion regarding whether to consider evidence submitted within five days of the hearing by finding that claimants’ circumstances fall within the exceptions listed in the regulations.<sup>439</sup> This discretion, NOSSCR asserted, if exercised to exclude evidence, results in an incomplete record, with the claimant’s only option to have the evidence considered existing at the Appeals Council level.<sup>440</sup> Fourth, the organization stated that the pilot program does not take into account “the realities of claimants obtaining representation.”<sup>441</sup> According to NOSSCR, claimants often seek “representation [either] shortly before the hearing or after receiving the hearing notice.”<sup>442</sup> The representative, then, NOSSCR asserted, does not have enough time to gather evidence, even though the hearing may still proceed.<sup>443</sup> Fifth, it believed that the five-day rule ignores the realities of obtaining and submitting medical evidence.<sup>444</sup> While NOSSCR strongly supports the submission of evidence as early as possible, it recognizes that there are a number of situations that may be outside of a representative’s control which inhibit his or her ability to submit evidence.<sup>445</sup> Some of the situations NOSSCR mentioned include: (1) hospitals have changed ownership or closed and transferred files elsewhere; (2) doctors do not make requests for medical records a high priority and lack staff to fulfill the requests timely; and (3) hospitals refuse to accept any but their own release forms, regardless of whether the other forms meet HIPPA standards.<sup>446</sup> Sixth, NOSSCR

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<sup>436</sup> *Id.* (internal quotations omitted).

<sup>437</sup> *See id.* One representative noted that the rule results in the cessation of an ALJ’s duty to develop the record on the hearing date. *See id.* This, the representative believed, is contrary to the claimant’s right to a full and fair hearing based on a complete record. *See id.*

<sup>438</sup> *See id.*

<sup>439</sup> *See id.* One representative believed that the “‘good cause’ rules . . . are too restrictive [and amount to] progressive discipline.” *Id.*

<sup>440</sup> *See id.* One representative commented that his practice is to submit in writing a request to admit late evidence should he foresee that he will not be able to submit the evidence timely. *See id.* “No judge has refused [his] requests.” *Id.* Another representative, while affirming that the 5-day rule is reasonable, has seen ALJs abuse their discretion. *See id.* He recommended the rule be clarified with regards to whether a brief may be submitted within 5 days of the hearing. *See id.* He also recommended that small exhibits be allowed up through the day of the hearing. *See id.* Yet another representative stated that some ALJs have “badly abused” the 5-day rule. *See id.* He noted that “[l]ate’ opinion evidence can be excluded very easily by the ALJ who wants to deny a claim.” *Id.*

<sup>441</sup> *Id.*

<sup>442</sup> *Id.* One representative stated that “clients often do not find their way to [representatives] in time to have at least 75 days advance notice of hearing.” *Id.* The representative noted that sometimes claimants even wait until after receiving an unfavorable decision from an ALJ before obtaining representation. *See id.*

<sup>443</sup> *See id.*

<sup>444</sup> *See id.*

<sup>445</sup> *See id.*

<sup>446</sup> *See id.*; *see also* Telephone interview with NOSSCR Representatives (May 6, 2013) (interview notes on file with authors) [hereinafter NOSSCR Interview]. These examples are only a few of those that NOSSCR provided. *See*

stated that the regulations fail to adequately account for claimants' changing medical conditions.<sup>447</sup> The organization noted that: (1) claimants' conditions often deteriorate over time; (2) some claimants have difficult-to-diagnose diseases; and (3) other claimants may not be able to adequately articulate their conditions.<sup>448</sup> According to NOSSCR, prematurely restricting evidence submission in these cases could result in denial of a claim based merely on technicalities.<sup>449</sup>

NOSSCR believed that the 75-day notice requirement works well and advocated displacing the other regions' 20-day notice requirement with it.<sup>450</sup> NOSSCR members stated that the 75-day notice requirement provides a reasonable timeframe in which they can develop the record.<sup>451</sup>

NOSSCR members highlighted some key concerns they have with the pilot program. One of the main concerns mentioned was inconsistency in the application of the regulations. As one representative put it, "In practice, it's '14 judges, 14 interpretations' of these rules."<sup>452</sup> Another representative noted that the five-day rule coupled with the 75-day notice requirement "generally improved practice[, but] have the potential to be used to hurt claimants."<sup>453</sup>

NOSSCR made a number of suggestions to improve the disability adjudication process in both Region I and the other regions. It recommended applying the 75-day notice requirement to all regions.<sup>454</sup> The organization also recommended eliminating the five-day rule and allowing evidence to be submitted until the hearing.<sup>455</sup> In the alternative, if the five-day rule is applied nationwide, the organization and its members recommended a number of modifications, including:

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NOSSCR Response, *supra* note 432. NOSSCR also noted that hospitals often require prepayment before providing medical records, and claimants may not be able to afford it. *See id.* Another obstacle NOSSCR identified involves the power of ALJs to subpoena records, but lack of power to enforce the subpoena coupled with the U.S. Attorney's office's power of enforcement, but lack of resources to exercise that enforcement power. *See id.*

<sup>447</sup> *See id.*

<sup>448</sup> *See id.*

<sup>449</sup> *See id.*

<sup>450</sup> *See id.*

<sup>451</sup> *See id.*

*See id.* One representative stated that it can take 6 weeks or more to secure records from certain hospitals. *See id.* Another representative said that sometimes medical providers submit the records quickly, thus resulting in a gap of documentation between that quick submission and the hearing—which could be a full two months. *See id.*

<sup>452</sup> *Id.* Another representative stated that some "judges apply [the rule] fairly and reasonably[, while o]ther judges apply it arbitrarily and capriciously." *Id.* Either way, he maintained, it's often the claimant who suffers. *See id.* One representative spoke of ALJs who:

- (1) count Saturday and Sunday as part of the 5 days . . . ;
- (2) end the 5 days on the day of the hearing, or end the five days the day before the hearing;
- (3) count holidays or don't count holidays as part of 5 days;
- (4) review the time evidence is filed, and if filed after the office has closed for the day, don't count that day;
- (5) include the representative's brief and claimant's medication sheets as subject to the five day rule . . . ;
- (6) never apply an exception to the five day rule . . . ; and
- (7) will always accept records within the 5 days.

*Id.*; *see also* NOSSCR Interview, *supra* note 446.

<sup>453</sup> NOSSCR Response, *supra* note 432.

<sup>454</sup> *See id.*

<sup>455</sup> *See id.*

- Add a good cause exception to allow the “claimant to submit new and material evidence”<sup>456</sup> not only after the hearing, but after the ALJ decision is issued. As a model, NOSSCR commended federal courts’ “sentence six” good cause exception, which allows new and material evidence to be considered for a number of reasons.<sup>457</sup>
- Change five days from business to calendar days.<sup>458</sup>
- Clarify the fifth business day deadline to mean midnight on the fifth day before the hearing.<sup>459</sup>
- Make the default posture one of evidence admittance with a generous admissibility policy and never apply the five-day rule to evidence that did not exist five days prior to the hearing date.<sup>460</sup>
- Exclude evidence only on the basis of “willful malfeasance on the part of the claimant’s representative.”<sup>461</sup>
- Admit, without exception, “[l]ate evidence that is from an ‘acceptable medical source’ that the record otherwise lacks.”<sup>462</sup>
- Detail reasons in the ALJ’s decision regarding why he or she declined to admit evidence.<sup>463</sup>
- Clarify the regulations regarding what does and does not constitute good cause for missing the evidence submission deadline.<sup>464</sup>
- Expand the number of exceptions to waive the five-day rule deadline.<sup>465</sup>

Most importantly, if the five-day rule is retained, NOSSCR strongly recommended that SSA clarify and issue more policy guidelines “to prevent arbitrary and inconsistent application of the rule by some ALJs.”<sup>466</sup>

## **b. National Association of Disability Representatives**

NADR also shared its perspective on the pilot program. While affirming the original pilot program’s good intentions, the organization noted that the program did not work as people had hoped it would.<sup>467</sup> One aspect of the current pilot program—the five-day rule—invoked a

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<sup>456</sup> *Id.*

<sup>457</sup> *See id.* Among other things, such reasons include: (1) “[m]edical evidence was not available at the hearing”; (2) “[t]he impairment was finally and definitively diagnosed”; and (3) [t]he existence of the evidence was discovered after the proceedings.” *Id.*; *see also* NOSSCR Interview, *supra* note 446.

<sup>458</sup> *See* NOSSCR Response, *supra* note 432.

<sup>459</sup> *See id.*

<sup>460</sup> *See id.*

<sup>461</sup> *Id.*

<sup>462</sup> *Id.*

<sup>463</sup> *See id.*

<sup>464</sup> *See id.*

<sup>465</sup> *See id.*

<sup>466</sup> *Id.*

<sup>467</sup> *See* E-mail from NADR Region I Rep., to Amber Williams, Att’y Advisor, Admin. Conf. of the U.S. (May 13, 2013) (on file with authors) [hereinafter NADR Response]. Among the aspects of DSI that fell short of NADR’s hopes include: (1) lack of medical coverage for uninsured claimants; (2) DRB’s inability to review ALJ denials timely; and (3) the failure of the Vocational/Medical Expert “bank” to work as it should. *See id.*

mixed response. NADR believed that the rule was reasonable when “flexibility is provided for mitigating circumstances, but when it is strictly enforced it may become an impediment that prevents the claimant from getting the correct decision in a timely manner.”<sup>468</sup> NADR understood the need for a rule assuring “timely, pre-hearing submission of voluminous medical documentation.”<sup>469</sup> Oftentimes, though, the organization believed that five-day rule does not allow for real life situations. It noted that medical providers lose requests for evidence, file medical statements before they are completed,<sup>470</sup> and decline to accept HIPPA-compliant release forms, to mention only a few situations.<sup>471</sup> Compounding the problem, NADR stated, ALJs apply the five-day rule inconsistently across Region I.<sup>472</sup> NADR feared that claimants will be penalized for either “shoddy representation” or “[r]igid adherence to the 5-day rule”<sup>473</sup> when the ALJ’s decision should be based on all of the evidence.<sup>474</sup>

NADR believed that the current regulations should be modified, clarified, and consistently applied.<sup>475</sup> To that end, the organization made some suggestions. While NADR stated that evidence should be provided as soon as possible, it noted that if the representative believes that he or she will be unable to secure the evidence timely due to circumstances outside of his or her control, the representative should ask the judge for a waiver of the five-day rule; the waiver should be automatically granted.<sup>476</sup> Similarly, the organization suggested that if the representative submitted evidence at the hearing, as long as the evidence is limited to 10 to 15 pages, the ALJ should automatically allow it into the record.<sup>477</sup> On the other hand, NADR believed that if the representative submitted voluminous evidence within five days of the hearing without a request to allow such evidence under one of the good cause exceptions, he or she should be sanctioned.<sup>478</sup>

NADR further suggested that “new and material” evidence submitted to the Appeals Council that “relates to the period on or before the ALJ decision” should be considered by that

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<sup>468</sup> *Id.*

<sup>469</sup> *Id.*

<sup>470</sup> NADR noted that it can take medical providers days or weeks to create records. *See id.*

<sup>471</sup> *See id.* NADR asserted that while representatives need to be working with medical providers to secure all the relevant evidence, they must be careful not to exacerbate the providers by requesting too much too frequently. *See* Telephone interview with NADR Representatives (May 15, 2013) (interview notes on file with authors) [hereinafter NADR Interview]. The organization stated that representatives need to cultivate a good relationship for this and future clients. *See id.*

<sup>472</sup> *See* NADR Response, *supra* note 467. Another major issue NADR stated is the inadequate processing of documents by ODAR staff. *See* NADR Interview, *supra* note 471. The organization maintained that representatives submit documents, but ODAR staff members fail to exhibit them in a timely manner, leading ALJs to decline to admit the evidence into the record. *See id.*

<sup>473</sup> NADR Response, *supra* note 467.

<sup>474</sup> *See id.*

<sup>475</sup> *See id.*

<sup>476</sup> *See id.*

<sup>477</sup> *See id.*; *see also* Interview with NADR Interview, *supra* note 471. NADR stated that most of the time, a representative will know how much material is yet to be submitted. *See id.* There are times, though, the organization maintained, when the amount of material—great or small—surprises the representative. *See id.*

<sup>478</sup> *See* NADR Response, *supra* note 467. NADR noted that sanctions against representatives should not be enacted in a vacuum; if ALJs are not doing their jobs, they should be sanctioned as well. *See* NADR Interview, *supra* note 471. Ultimately, the organization asserted, whether evidence is admitted should not adversely affect the client, rather, it should only adversely affect the person not doing his or her job. *See id.*

body.<sup>479</sup> Coupled with that suggestion, the organization recommended clarifying what “relates to the period” means.<sup>480</sup> NADR affirmed the 75-day notice requirement as providing a reasonable timeframe to collect evidence.<sup>481</sup> However, it tempered its affirmation by noting that, at times, representatives are unable to provide evidence timely because they must rely on medical providers who are not always timely themselves.<sup>482</sup>

Overall, NADR believed the 75-day notice requirement should be implemented nationwide immediately.<sup>483</sup> The organization was more cautious regarding the five-day rule. NADR would support the pilot program being continued and then expanded to the other regions only if the changes it recommended to the five-day rule are implemented.<sup>484</sup>

### **3. American Bar Association**

To obtain the perspective of an organization that represents a variety of views, we contacted the ABA<sup>485</sup> about the Region I pilot program. As with the ALJ and claimant representative organizations, we sent the ABA questions<sup>486</sup> and after receiving its response, interviewed one of its representatives.

The ABA stated that it “support[s] efforts to move cases quickly and reduce the backlog of SSA disability claims by encouraging a greater effort to issue a correct decision as early in the process as possible.”<sup>487</sup> At the same time, the ABA also asserted the need for a high quality of intake and evidentiary development early in the process.<sup>488</sup> The organization expressed concern that certain claims that could have been decided faster are instead routed through the elaborate appellate process.<sup>489</sup> In order to facilitate faster processing of claims, the ABA suggested that the agency advise claimants that if they provide medical evidence and work histories promptly, their claims may be adjudicated in a timelier manner.<sup>490</sup>

The organization noted that it “does not have specific policy on the issue of closing the record in SSA hearings,”<sup>491</sup> but highlighted a policy it adopted in 2003 relating to Medicare

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<sup>479</sup> See NADR Response, *supra* note 467.

<sup>480</sup> See *id.*

<sup>481</sup> See *id.*

<sup>482</sup> See *id.* In actuality, NADR noted that hearings are often noticed 90 days in advance of the hearing date. See NADR Interview, *supra* note 471.

<sup>483</sup> See *id.*

<sup>484</sup> See NADR Response, *supra* note 467.

<sup>485</sup> The ABA was founded in 1878. It “is one of the world’s largest voluntary professional organizations, with nearly 400,000 members and more than 3,500 entities.” See [http://www.americanbar.org/utility/about\\_the\\_aba.html](http://www.americanbar.org/utility/about_the_aba.html) (last visited June 2, 2013).

<sup>486</sup> The response we received from the ABA is included in the appendix. See APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, at App. J, pp. A-163 to A-165.

<sup>487</sup> Letter from ABA Dir., to Paul R. Verkuil, Chairman, Admin. Conf. of the U.S. (May 15, 2013) (on file with authors) [hereinafter ABA Response].

<sup>488</sup> See *id.*

<sup>489</sup> See *id.*

<sup>490</sup> See *id.*

<sup>491</sup> See *id.* But see ABA REPORT, *supra* note 3, at 17 (supporting closing the record in SSA disability adjudication, subject to an exception for good cause). The ABA representative with whom we spoke confirmed that this

adjudication. Its Medicare policy stated that: “The record should not be closed prior to the hearing. After the ALJ hearing, beneficiaries should be provided the opportunity to reopen the record for good cause.”<sup>492</sup>

While the ABA approved of the 75-day notice requirement without reservation,<sup>493</sup> the organization urged caution should SSA decide to adopt the five-day rule. While the ABA recognized that the five-day rule addressed its concerns regarding the ability of claimants to submit relevant evidence,<sup>494</sup> it simultaneously encouraged vesting ALJs with discretion to waive the rule; a decision based on all relevant evidence is of paramount importance.<sup>495</sup> The organization emphasized the needs of the claimant and the related requirements of due process, noting that those needs are not met either when representatives do not submit evidence timely, or when ALJs do not allow evidence under good cause exceptions.<sup>496</sup>

The ABA affirmed the informal and nonadversarial nature of the SSA hearing process, as well as the ALJ’s role “as a true independent fact-finder who has a duty to develop the record.”<sup>497</sup> The organization stated that it supports this role over a move to an appellate, legalistic process.<sup>498</sup> Ultimately, the ABA recommended expanding the pilot program to a portion of another region with modified regulations that would result in more fully developed files.<sup>499</sup>

#### **D. Judicial Decisions Applying the Pilot Program’s Evidentiary Standards**

Region I is comprised of states spanning both the First and Second Circuits.<sup>500</sup> Only five reported cases involving the five-day rule have emerged from the federal court system—four from the District of Maine, and one from the District of Connecticut. Each of the four decisions from Maine upheld the adjudicator’s—ALJ or DRB—decision to close the record; however, the decision from Connecticut remanded the case to the agency. The following part includes summaries and analyses of the five cases.

##### ***1. Majority View: Affirming Disallowance of Untimely Evidence***

***Black v. Astrue***:<sup>501</sup> The plaintiff filed suit alleging, among other things, that the ALJ “failed to consider all relevant, material evidence”<sup>502</sup> by “refusing at [the] hearing to admit

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statement remains valid. See Telephone interview with ABA Representatives (May 17, 2013) (interview notes on file with authors) [hereinafter ABA Interview].

<sup>492</sup> ABA Response, *supra* note 487 (internal quotations omitted).

<sup>493</sup> See ABA Interview, *supra* note 491.

<sup>494</sup> The organization, in the next paragraph, doubted the legality of the 2007 NPRM, which proposed “to limit the submission of new evidence to the ALJ to five business days before the hearing.” ABA Response, *supra* note 487.

<sup>495</sup> See *id.*

<sup>496</sup> See *id.*

<sup>497</sup> *Id.*

<sup>498</sup> See *id.*

<sup>499</sup> See ABA Interview, *supra* note 491.

<sup>500</sup> Maine, Massachusetts, New Hampshire, and Rhode Island are part of the First Circuit; Connecticut is part of the Second Circuit.

<sup>501</sup> No. 10-175, 2011 WL 1226027 (D. Me. Mar. 29, 2011) *aff’d sub nom. Black v. Soc. Sec. Admin. Com’r*, 2011 WL 1465443 (D. Me. Apr. 18, 2011).



tardily submitted evidence.”<sup>503</sup> At the hearing, the attorney attempted to submit an assessment by the plaintiff’s psychiatrist, which he had been told had been previously filed with the ALJ.<sup>504</sup> The form, however, had not been filed. The attorney’s staff had sent it back to the psychiatrist because he had failed to complete it in pertinent part.<sup>505</sup> The staff believed that if the form was not filled out properly, it would not support a finding of disability. The ALJ declined to admit the evidence because the attorney “had ample opportunity to submit such documentation in a timely manner”<sup>506</sup>—the attorney had represented the plaintiff for an adequate period of time and the psychiatrist had treated the plaintiff for the past year. Moreover, “there were no extant circumstances as outlined per [the regulations] that prevented timely submission of evidence, and as such the parameters [were] not met.”<sup>507</sup> When appealing the decision to the district court, the attorney argued that (1) SSA “misled” the plaintiff because the hearing notice was issued significantly fewer days than the 75-day notice requirement<sup>508</sup> and (2) the miscommunication between him and his staff constituted an “unusual, unexpected, or unavoidable circumstance.”<sup>509</sup> The court determined that (1) SSA had not mislead the plaintiff since the plaintiff “had filed a written waiver of his right to a 75-day written notice of the hearing,”<sup>510</sup> and (2) neither miscommunication nor belief that incomplete records would not support a disability claim met the regulatory exceptions for “timely filing.”<sup>511</sup>

***Beaucage v. Astrue***.<sup>512</sup> The plaintiff alleged, among other things, that the DRB “erred when it refused to consider medical records submitted after the [ALJ] had issued her decision.”<sup>513</sup> The attorney’s staff “mistakenly failed to file the [doctor’s] statement with other records timely submitted.”<sup>514</sup> The attorney did not realize the mistake until after the ALJ’s decision was issued. The plaintiff also alleged that the ALJ had acted as if she admitted the missing file.<sup>515</sup> The DRB, however, declined to consider the report. The court upheld the DRB’s decision, stating that the plaintiff did not meet the regulatory threshold—not only did the late submission of evidence have to be caused by an unusual, unexpected, or unavoidable circumstance outside of the plaintiff’s control, but also that evidence must have had a reasonable probability of changing the outcome of the decision.<sup>516</sup> The court found that miscommunication between an attorney and his staff did not meet the regulatory requirement of an unusual, unexpected, or unavoidable circumstance,<sup>517</sup> and therefore did not find it necessary to decide whether the evidence met the reasonable probability threshold. However, if the court had to

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<sup>502</sup> *Id.* at \*2.

<sup>503</sup> *Id.*

<sup>504</sup> *See id.* at \*3.

<sup>505</sup> *See id.*

<sup>506</sup> *Id.* at \*4.

<sup>507</sup> *Id.*

<sup>508</sup> *See id.*

<sup>509</sup> *Id.* at \*5.

<sup>510</sup> *Id.* at \*4.

<sup>511</sup> *Id.* at \*5.

<sup>512</sup> No. 10-326, 2011 WL 2600978 (D. Me. June 29, 2011) report and recommendation adopted, 2011 WL 2892507 (D. Me. July 19, 2011).

<sup>513</sup> *Id.* at \*1.

<sup>514</sup> *Id.* at \*2.

<sup>515</sup> *See id.* at \*3.

<sup>516</sup> *See id.* at \*2-3.

<sup>517</sup> *See id.* at \*3.

reach that issue, it still would not have found the newly submitted evidence to reach the regulatory threshold.<sup>518</sup>

**Newcomb v. Astrue.**<sup>519</sup> The plaintiff sued, alleging, among other things, that the ALJ “erred in barring her from presenting additional medical evidence that . . . would have been helpful in forming his opinions.”<sup>520</sup> At the hearing, her attorney attempted to have a person testify who had been the lead case manager at meetings the plaintiff attended for treatment and support.<sup>521</sup> The attorney was unaware that notes had been taken at the meetings until the day before the hearing.<sup>522</sup> The ALJ denied his motion to allow the lead case manager to testify since the meeting notes had not been timely filed, making cross examination unfair and unreliable.<sup>523</sup> The ALJ, however, allowed “the plaintiff to file a written offer of proof post-hearing.”<sup>524</sup> When the attorney “moved for an extension of time to obtain and file [additional] records” that he learned about at the hearing, the ALJ again declined.<sup>525</sup> The ALJ noted that the regulations were created, in part, to address the “systemic lack of preparation on the day of the hearing, or after the hearing[, which] led to a delay in adjudication that was intolerable. [He stated that] there [were] situations where late filed evidence should be admitted, [but] in order to do that, there ha[d] to be good cause.”<sup>526</sup> The attorney filed a post-hearing letter asserting that he had been “misled regarding the existence of the” records and that the regulatory standards had been met because he had made a good faith effort to obtain all the records prior to the hearing.<sup>527</sup> He requested that the record be kept open and that a supplemental hearing be scheduled, remarking that anything less would be “unfair to this claimant and contrary to [the ALJ’s] duty to develop the medical record before issuing a decision.”<sup>528</sup> The court upheld the ALJ’s declination to admit the evidence because the “plaintiff had failed to show ‘good cause’ for [the] tardy admission [of evidence], that is, . . . she failed to meet any of the three enumerated circumstances in which post-hearing evidence *must* be admitted pursuant to”<sup>529</sup> the regulations. The court held that the ALJ “ha[d] no obligation to accept late tendered evidence unless good cause [wa]s shown.”<sup>530</sup> Here, the plaintiff failed to show good cause.

**Raymond v. Astrue.**<sup>531</sup> Among other things, the plaintiff alleged that the ALJ “improperly refused to admit certain evidence.”<sup>532</sup> The plaintiff tried to submit his doctor’s evaluation the day before the hearing, but the ALJ “refused to admit [it] because it had not been

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<sup>518</sup> See *id.* at \*4.

<sup>519</sup> No. 11-02, 2012 WL 47961 (D. Me. Jan. 6, 2012) report and recommendation adopted, 2012 WL 206278 (D. Me. Jan. 24, 2012).

<sup>520</sup> *Id.* at \*1.

<sup>521</sup> See *id.* at \*2.

<sup>522</sup> See *id.*

<sup>523</sup> See *id.*

<sup>524</sup> *Id.* at \*3.

<sup>525</sup> *Id.* at \*4.

<sup>526</sup> *Id.* at \*5.

<sup>527</sup> *Id.*

<sup>528</sup> *Id.*

<sup>529</sup> *Id.* at \*9 (emphasis in original).

<sup>530</sup> *Id.* at \*10.

<sup>531</sup> No. 12-92, 2012 WL 6913437 (D. Me. Dec. 31, 2012) aff’d, 2013 WL 214569 (D. Me. Jan. 18, 2013).

<sup>532</sup> *Id.* at \*1.

timely presented before the hearing.”<sup>533</sup> The plaintiff contended that he was unaware either of the report’s existence or of his estranged wife having any of his medical records.<sup>534</sup> He tried to submit the evidence under the exception that allows for late submission where unusual, unexpected, or unavoidable circumstances outside of the claimant’s control prevent timely submission of evidence.<sup>535</sup> The court upheld the ALJ’s decision to bar the evidence, noting that neither did (1) the plaintiff allege any impairment that prevented him from remembering that the doctor examined him nor (2) did anything inhibit him from asking his estranged wife whether she had any of his medical records.<sup>536</sup> The court held that the ALJ did not abuse his discretion when declining to consider such evidence.<sup>537</sup>

Overall, the district court in Maine recognized the need for the rule and deferred to the adjudicator’s application of it. While the court performed an inquiry evaluating whether substantial evidence existed to support the adjudicator’s decision to apply the rule in each case, it gave deference to the adjudicator’s reasoning about whether to admit the evidence.

Only once did the district court mention “Sentence Six.”<sup>538</sup> Even if the court deferred to the agency’s findings, a case would be reversed and remanded when a plaintiff met “Sentence Six” requirements. In other words, the only other circumstance in which a plaintiff may have his or her case “revers[ed] and remand[ed] for consideration of evidence not presented to an [ALJ was] only [when] that evidence [wa]s new and material *and* the plaintiff demonstrate[d] good cause for its belated submission.”<sup>539</sup> As the district court in Maine noted, good cause was a stringent standard to meet.<sup>540</sup> The standard was necessarily stringent because Congress wanted to avoid cases being interminably bounced back and forth between the agency and the courts, resulting in delays both to the case at hand and to other pending cases.<sup>541</sup>

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<sup>533</sup> *Id.* at \*3.

<sup>534</sup> *See id.*

<sup>535</sup> *See id.*

<sup>536</sup> *See id.*

<sup>537</sup> *See id.*

<sup>538</sup> As previously explained in Pt. II.B.1, “Sentence Six” refers to the sixth sentence in 42 U.S.C. 405(g). It reads:

The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner’s answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and *it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding*; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner’s findings of fact or the Commissioner’s decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner’s action in modifying or affirming was based.

*Id.* (emphasis added).

<sup>539</sup> *Black v. Astrue*, No. 10-175, 2011 WL 1226027, at \*6 (D. Me. Mar. 29, 2011) ) *aff’d sub nom. Black v. Soc. Sec. Admin. Com’r*, 2011 WL 1465443 (D. Me. Apr. 18, 2011) (emphasis in original).

<sup>540</sup> *See id.*

<sup>541</sup> *See id.*

## 2. *Minority View: Exclusion of Evidence Improper*

*Savo v. Astrue*.<sup>542</sup> The issue before the court was, among other things, “whether the [ALJ] improperly excluded evidence submitted by the plaintiff after the [a]dministrative [h]earing.”<sup>543</sup> The court found that the ALJ in fact did improperly exclude evidence. The court cited the ALJ’s duty “to develop a complete medical record before making a disability determination.”<sup>544</sup> In this instance, the court found that the ALJ acted contrary to that duty by “excluding evidence that suggest[ed] a worsening of the plaintiff’s condition simply because the plaintiff submitted the evidence without explaining why the records were late.”<sup>545</sup> The court cited “Sentence Six” and looked to *Tirado v. Bowen*<sup>546</sup> for guidance.<sup>547</sup> *Tirado v. Bowen* provided the Second Circuit’s standard regarding when a court should remand a case to the agency for consideration of new evidence according to a three part test:

First, the new evidence must be new and not materially cumulative of what is already in the record. Second[,] the evidence must be both relevant to the [plaintiff’s] condition during the time period in which benefits were denied[,] and probative. Third, the plaintiff must demonstrate good cause for the failure to present the evidence earlier.<sup>548</sup>

The court found that the plaintiff met all three requirements. First, the records pertained to surgery and treatment that occurred after the hearing.<sup>549</sup> Second, the records were material, since they contradicted the finding of the ALJ.<sup>550</sup> Third, the plaintiff had good cause for not filing the records sooner (because they did not exist earlier).<sup>551</sup> SSA maintained that the ALJ was correct in denying the submission of this evidence because the plaintiff failed to give a reason why the evidence was not submitted sooner.<sup>552</sup> The court disagreed with the agency’s reasoning by noting that the evidence *could not* have been submitted sooner. The court further stated that the agency did not argue that the evidence was submitted late for an improper reason.<sup>553</sup> The court remanded the case for the agency to consider the additional evidence.<sup>554</sup>

In our view, the court appeared keener to follow its circuit’s case law under “Sentence Six”—it cited a Second Circuit opinion from 1988 when evaluating whether to remand the case to SSA—than to apply the existing regulations. It focused on the fact that the plaintiff could not have submitted the evidence *before* the hearing because he underwent surgery *after* the hearing. We believe that the court correctly noted that the ALJ must consider evidence if an “unusual, unexpected, or unavoidable circumstance” prevented the plaintiff from submitting evidence

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<sup>542</sup> No. 10-1612, 2011 WL 5025488 (D. Conn. Oct. 21, 2011).

<sup>543</sup> *Id.* at \*1.

<sup>544</sup> *Id.*

<sup>545</sup> *Id.*

<sup>546</sup> 842 F.2d 595 (2d Cir. 1988).

<sup>547</sup> *Savo v. Astrue*, No. 10-1612, 2011 WL 5025488, at \*2 (D. Conn. Oct. 21, 2011).

<sup>548</sup> *Id.* (citing *Tirado*, 842 F.2d at 597) (internal quotations omitted).

<sup>549</sup> *See id.*

<sup>550</sup> *See id.*

<sup>551</sup> *See id.*

<sup>552</sup> *See id.*

<sup>553</sup> *See id.*

<sup>554</sup> *See id.* at \*3.

timely. However, we also believe that the court failed to address whether the surgery was “unusual, unexpected, or unavoidable.” Certainly the plaintiff could not submit records five days before the hearing that did not exist at that time, but that fact alone is not sufficient to meet the regulatory exception to the timely evidence submission requirement. The circumstance that prevented the claimant from submitting records timely—in this case, surgery—must be “unusual, unexpected, or unavoidable.” Absent that qualification, the plaintiff failed to meet the exception.<sup>555</sup>

#### **IV. RECORD CLOSURE IN OTHER FEDERAL AGENCY ADJUDICATION PROGRAMS**

SSA, of course, is not the only adjudicatory system that must deal with the issue of when (or under what circumstances) to close the evidentiary (i.e., administrative) record. We provide below a brief overview of the record closure rules from a sampling of other federal agencies’ adjudicatory schemes. While mindful of the non-adversarial nature of SSA’s adjudication of disability benefits claims, these examples—drawn from both adversarial and non-adversarial systems—provide useful context for the evaluation of Region I’s pilot program and weighing potential expansion to other regions.

The record closure practices for adjudicatory programs at the 10 federal agencies we researched show a spectrum of approaches. At one end of this spectrum, two of these adjudication programs—the Department of Labor’s (“DOL’s”) adjudication of black lung claims and the Environmental Protection Agency’s (“EPA’s”) adjudication of civil penalties and adverse permit actions—close the record a specified number of days before the scheduled hearing subject to certain exceptions. Adjudicatory agencies in the middle close the evidentiary record at the conclusion of the administrative hearing, subject to good cause-based and/or materiality exceptions. Lastly, on the other end of the record-closing spectrum stands the adjudication of veterans’ disability compensation (and other benefits claims) wherein the record remains open throughout the administrative process before the Department of Veterans Affairs (“VA”).

##### **A. Closure of the Record Prior to the Hearing: A Less Common Approach**

Our research uncovered two agency adjudication schemes that close the administrative record prior to the hearing. First, the rules of practice governing adjudication of black lung benefits claims by DOL ALJs generally restrict introduction of documentary evidence at the hearing level—including medical evidence—unless such evidence has been exchanged with the opposing party at least 20 days prior to the hearing.<sup>556</sup> These rules of practice provide, in pertinent part: “[D]ocumentary material, including medical reports . . . may be received in evidence . . . if such evidence is sent to all other parties at least 20 days before a hearing is held

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<sup>555</sup> According to the court, the ALJ declined to consider the additional records because the “plaintiff did not articulate a specific reason why they were late.” *See id.* at \*2. It is conceivable that had the ALJ more specifically discussed why he declined to admit such records (i.e., explain the regulatory requirements and how the plaintiff did not meet them, rather than merely stating that the plaintiff failed to give a specific reason for the late submission), the court may have come to a different conclusion.

<sup>556</sup> *See* 20 C.F.R. § 725.456(b)(2) (2012). As noted below, however, the Department of Labor (“DOL”)’s consolidated rules of practice for adjudication of other worker’s compensation and whistleblower claims set a different timeframe for record closure. *See* discussion *infra* Section IV.B.

in connection with the claim.”<sup>557</sup> The purpose of this provision is to prevent unfair surprise and promote submission of a full record.<sup>558</sup> If a party fails to comply with the 20-day rule, evidence may still be admitted upon either the consent of all parties or a showing of good cause.<sup>559</sup> If an ALJ admits medical evidence under the foregoing exception, the hearing record must then be kept open after the hearing for at least 30 days “to permit the parties to take such action as each considers appropriate in response to such [late] evidence.”<sup>560</sup> On the other hand, if a party fails to comply with the 20-day rule and cannot satisfy any of the exceptions for late submission, the ALJ has the discretion either to exclude the late evidence or remand the case back to the first-line decision-maker (here, the district director) for consideration of such evidence.<sup>561</sup>

In reviewing cases involving the 20-day rule, at least one court has noted the potential for tension between the prevention unfair surprise and procedural fairness in certain situations. In *Bethlehem Mines Corp. v. Henderson*, the Fourth Circuit addressed this issue:

Rigidly enforced without exception . . . the twenty-day rule itself would invite abuse by encouraging parties to withhold evidence until just before the deadline. Yet we caution that neither the [Administrative Procedure Act] nor considerations of due process should be understood as providing a license for a dilatory party to delay preparation and timely submission of its affirmative case. The APA makes clear that a party is only entitled to such rebuttal ‘as may be required for a full and true disclosure of the facts.’<sup>562</sup>

The *Bethlehem Mines* court went on to find that, on the particular facts of the case, the appellant mining corporation was not denied a fair hearing by the ALJ’s refusal to permit post-hearing depositions.<sup>563</sup>

A second agency with adjudicatory rules closing the record prior to the hearing is the Environmental Protection Agency. EPA’s rules of practice for its administrative forum for the adjudication of civil penalties and adverse permit actions close the record 15 days before a hearing, subject to good cause exceptions. The rule, which is set forth in 40 C.F.R. § 22.22, provides that if a party fails to properly disclose documentary materials or witness lists to an opposing party as part of the requisite pre-hearing informational exchange, the Presiding Officer “shall not admit” such information into evidence “unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing

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<sup>557</sup> *Id.*

<sup>558</sup> *See Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 148-49 (4th Cir. 1991).

<sup>559</sup> 20 C.F.R. § 725.456(b)(3) (2012).

<sup>560</sup> *Id.* at § 725.456(b)(4) (2012).

<sup>561</sup> *Id.* at § 725.456(b)(3) (2012).

<sup>562</sup> *Bethlehem Mines*, 939 F.2d at 148-49. Interestingly, §725.456(b)(4) (2012) also contains a provision affording an ALJ the ability to exclude late evidence if, in his or her opinion, the late submission resulted from intentional dilatory tactics: “If, in the opinion of the administrative law judge, evidence is withheld from the parties for the purpose of delaying the adjudication of the claim, the administrative law judge may exclude such evidence from the hearing record and close the record at the conclusion of the hearing.”

<sup>563</sup> *Bethlehem Mines*, 939 F.2d at 149.

so.”<sup>564</sup> Thus, as with DOL’s adjudicatory scheme for black lung claims, EPA’s information exchange and record closure provision seeks to prevent unfair surprise, but is tempered by a good cause exception to ensure procedural fairness.

## **B. Post-Hearing Closure of the Record: The Predominant Practice**

More common are agency adjudication schemes that close the record somewhat later in the hearing process—typically, at the conclusion of the hearing or a few days afterward. None of these agencies, however, definitively “close” the record post-hearing. Rather, each agency’s rules of practice for their adjudicatory process set forth materiality or good cause exceptions that permit additional evidence to be included in the hearing record. Thus, with respect to record closure, the differences among these agencies’ adjudicatory procedures typically lay in the variety of formulations for these exceptions. Some examples of these agencies’ record-closing provisions (and their respective exceptions) include:

- ***Merit Systems Protection Board (“MSPB”)***: When adjudicating claims by federal employees under the federal merit systems, MSPB rules “ordinarily” close the record at the conclusion of a hearing.<sup>565</sup> MSPB rules also provide that, once the record closes, the (non-ALJ) judge generally will not accept additional evidence or argument unless “(1) [t]he party submitting it shows that the evidence or argument was not readily available before the record closed, or (2) [i]t is in rebuttal to new evidence or argument submitted by the other party just before the record closed.”<sup>566</sup>
- ***U.S. Department of Justice Executive Office for Immigration Review (“EOIR”) & Department of Labor Office of Administrative Law Judges (“DOL/OALJ”)***: Interestingly, although DOL uses ALJs and EOIR does not, the rules of practice for record closure in EOIR immigration proceedings precisely mirror those for DOL/OALJ’s adjudication of claims outside the context of black lung claims (such as worker’s compensation and whistleblower claims).<sup>567</sup> For both EOIR and DOL/OALJ proceedings, the record closes at the conclusion of the hearing “unless the [ALJ] directs otherwise.”<sup>568</sup> Once the record closes, no new evidence may be accepted into the record except upon a showing by the party proffering the tardy evidence that such evidence is

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<sup>564</sup> 40 C.F.R. § 22.22(a)(1) (2012).

<sup>565</sup> 5 C.F.R. § 1201.58(a) (2012). The MSPB record closing rule states in full: “When there is a hearing, the record ordinarily will close at the conclusion of the hearing. When the judge allows the parties to submit argument, briefs, or documents previously identified for introduction into evidence, however, the record will remain open for as much time as the judge grants for that purpose.” *Id.*; see also *Zwerling v. Office of Personnel Mgmt.*, 1997 U.S. App. LEXIS 32339, \*\*5-6 (Fed. Cir. 1997) (affirming administrative judge’s refusal, under 5 C.F.R. § 1201.58, to accept late-tendered medical records when plaintiff failed to establish due diligence in obtaining records from doctor’s office).

<sup>566</sup> 5 C.F.R. § 1201.58(c) (2012).

<sup>567</sup> Congress has vested DOL with the responsibility to conduct formal hearings for over 60 different federal laws, including black lung benefits, other worker’s compensation programs, and whistleblower claims. See, e.g., Dept. of Labor, Rules of Practice and Procedure for Hearings Before the Office of Administrative Law Judges; Proposed Rules, 77 Fed. Reg. 72,142, 72,142-44 (Dec. 4, 2012) (discussing Congress’ expansion of DOJ/OALJ’s jurisdictional authority in the last two decades) [hereinafter “DOL/OALJ Rules of Practice NPRM”].

<sup>568</sup> 28 C.F.R. § 68.49(a) (2012) (EOIR); 29 C.F.R. § 18.54(a) (2012) (DOL/OALJ).

“new and material” and “was not readily available prior to the closing of the record.”<sup>569</sup> Barring a showing of good cause, all requests to submit documents after the record closes must be filed not later than 20 days after the hearing and other parties to the proceeding “shall have an opportunity to comment thereon.”<sup>570</sup>

- ***Railroad Retirement Board (“RRB”) Bureau of Hearings and Appeals:*** The RRB adjudicates benefits claims under the Railroad Retirement and Railroad Unemployment Insurance Acts by railroad workers and their families.<sup>571</sup> For hearings held by the Bureau of Hearings and Appeals to adjudicate retirement-survivor benefits claims under the Railroad Retirement Act, the record “shall be closed” at the end of the hearing “except where the hearings officer has determined that additional evidence not offered by the [claimant] at or prior to the hearing is available.”<sup>572</sup> Claimants may request additional time to submit post-hearing evidence—up to 30 days—based on “a showing of good cause for failure to have submitted the evidence earlier.”<sup>573</sup> For decisions appealed to the full (three-person) RRB, appellants do not have the right to submit additional evidence. The Board generally bases its decision on the record before the hearings officer—who is not an ALJ—and generally does not accept additional evidence or hold a hearing.<sup>574</sup> However, the Board may, in its discretion, grant an appellant’s request to augment the record “when new and material evidence is available that, despite due diligence, was not available before the decision of the hearings officer was issued.”<sup>575</sup>
- ***Department of Agriculture (“USDA”):*** USDA administers several different administrative adjudication schemes. First, for example, formal USDA hearings—which are presided over by ALJs—cover claims related to a wide variety of agency programs, ranging from marketing orders, to animal health, to grain standards.<sup>576</sup> While the rules of

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<sup>569</sup> 28 C.F.R. § 68.49(c) (2012) (EOIR); 29 C.F.R. § 18.54(c) (2012) (DOL/OALJ). DOL has proposed to update its rules of practice for ALJ proceedings, including revisions to its record closure provisions. See DOL/OALJ Rules of Practice NPRM, *supra* note 567, at 72,173, 72,192 (proposing, among other things, to consolidate 29 C.F.R. §§ 18.54, 18.55 into new 29 C.F.R. § 18.90 and to revise certain text related to record closure). With respect to submission of post-hearing evidence, DOL proposes modest modification to the materiality/good cause formulation. DOL’s proposed exception states, in pertinent part: “No additional evidence may be admitted [after the record closes] unless the offering party shows that new and material evidence has become available that could not have been discovered with reasonable diligence before the record closed.” *Id.* at 72,192 (29 C.F.R. § 18.90(b)(1)).

<sup>570</sup> 28 C.F.R. § 68.50 (2012) (EOIR); 29 C.F.R. § 18.55 (2012) (DOL/OALJ). DOL’s proposed regulatory revisions to the record closure provisions governing DOL/OALJ proceedings would remove the 20-day limit on post-hearing evidentiary submissions. The preamble to the DOL/OALJ Rules of Practice NPRM characterizes this 20-day limit as “unnecessarily restrictive.” DOL/OALJ Rules of Practice NPRM, *supra* note 567, at 72,173. DOL proposes to replace the 20-day requirement with a more general regulatory exhortation that parties must request permission to submit post-hearing evidence “promptly after the additional evidence is discovered.” *Id.* at 72,192 (29 C.F.R. § 18.90(b)(1)).

<sup>571</sup> See e.g., U.S. Railroad Retirement Board—An Agency Overview (January 2013), available at [http://www.rrb.gov/opa/agency\\_overview.asp](http://www.rrb.gov/opa/agency_overview.asp). The RRB also has administrative responsibilities under the Social Security Act for certain types of payments and railroad workers’ Medicare coverage. *Id.*

<sup>572</sup> See 20 C.F.R. § 260.5(k) (2012).

<sup>573</sup> *Id.*

<sup>574</sup> *Id.* § 260.9(e) (2012); see also RAILROAD RETIREMENT BOARD, RAILROAD RETIREMENT HANDBOOK 2012 40 (2012); RRB Form HA-2 (02-12), available at <http://www.rrb.gov/pdf/ha2.pdf>.

<sup>575</sup> *Id.*

<sup>576</sup> See, e.g., 7 C.F.R. § 1.31 (2012).



practice for formal USDA hearings do not explicitly close the record at the end of hearings, such record closure is evident from the rule governing petitions for reopening hearings, which states: “A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision by the [ALJ].”<sup>577</sup> Such petitions must, among other things, show the evidence is not cumulative and “set forth a good reason why such evidence was not adduced at the hearing.”<sup>578</sup>

Also, USDA’s National Appeals Division (“NAD”) provides independent, informal (non-ALJ) hearings for any person who receives an adverse program decision (e.g., denial, suspension, or revocation of a license) relating to a host of agricultural, commodity, and resource conservation programs.<sup>579</sup> NAD rules of practice require the hearing officer to leave the evidentiary record open for 10 days following the hearing (unless he or she establishes a different period of time) to “allow for submission of information by the [party] or the agency, to the extent necessary to respond to new facts, information, arguments, or evidence presented or raised at the hearing.”<sup>580</sup> While the NAD regulations do not specifically provide hearing officers with discretion to reject post-hearing evidence, USDA’s published guidance—*The National Appeals Division Guide*—suggests there are indeed constraints on introduction of additional evidence:

If a party wishes to submit additional information [after the hearing has adjourned], the Hearing Officer shall determine if it is relevant and necessary to the determination. Evidence that was unavailable at the hearing, such as a party’s response to a new issue or to evidence presented at the hearing, may be submitted after the hearing. . . . The Hearing Officer will add to the hearing record any new information provided after the hearing and may allow other part(ies) to respond to it.<sup>581</sup>

While there is no publicly available information regarding the application of this provision by USDA hearing officers, the *NAD Guide* nonetheless seems to establish materiality constraints on submission of post-hearing evidence.

- ***Department of Health and Human Service (“HHS”) - Office of Medicare Hearings and Appeals:*** The statute governing administrative appeals before ALJs employed by HHS’s Office of Medicare Hearings and Appeals provides, indirectly, for closure of the record for initial Medicare-related determinations by precluding introduction of evidence on administrative appeal that was not submitted at the initial determination level. That is, to promote “full and early presentation of evidence,” 42 U.S.C. § 1395ff (b)(3) forecloses an appellant from introducing new evidence on appeal absent a showing of “good cause”

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<sup>577</sup> *Id.* § 1.146(a)(2) (2012).

<sup>578</sup> *Id.*

<sup>579</sup> See 7 C.F.R. pt. 11 (2012); USDA, THE NATIONAL APPEALS DIVISION GUIDE (Oct. 2008), available at <http://www.nad.usda.gov/Forms/NAD%20Guide%20%28October%202008%29.pdf> [hereinafter NAD GUIDE].

<sup>580</sup> 7 C.F.R. § 11.8(c)(7) (2012). The NAD GUIDE states, however, that extending record closure beyond 20 days after the hearing is “discouraged.” NAD GUIDE, *supra* note 579, at 42.

<sup>581</sup> See NAD GUIDE, *supra* note 579, at 41-42.

explaining why such evidence could not have been submitted at or before the initial hearing-level determination.

- ***United States Coast Guard***: The Coast Guard’s program for adjudication of matters involving merchant mariners also closes the record—subject to broad ALJ discretion for reopening—at the conclusion of the hearing. The pertinent provision provides that “[w]hen the ALJ closes the hearing, he or she shall also close the record of the proceeding . . . unless he or she directs otherwise. Even after the ALJ closes it, he or she may reopen it.”<sup>582</sup>

Lastly, it bears noting that the Administrative Conference’s “Model Adjudication Rules” published in 1994 set forth guidance on record closure in agency adjudication proceedings. Model Adjudication Rule 330 provides, in pertinent part:

At the conclusion of the hearing, the record shall be closed unless the Adjudicator directs otherwise. Once the record is closed, no additional evidence shall be accepted except upon a showing that the evidence is material and that there is good cause for failure to produce it in a timely fashion . . . . [¶] Comment 1: In particular categories of adjudication (i.e., social security cases), an agency may wish to accord broader discretion to the Adjudicator to delay closing the record or to admit additional evidence after the record has been closed. See ACUS Recommendation 90-4(4), 1 C.F.R. § 305.90-4(4).<sup>583</sup>

As can be seen above, most administrative adjudication schemes follow—in some fashion—this guidance on record closure, though the precise formulation of their respective rules of practice vary from agency to agency.

### **C. Open Record: Unique Approach by the Veteran’s Administration**

At the other end of the record-closure spectrum is VA. VA not only leaves the record open throughout the adjudicatory process, but also, in effect, after the adjudicatory process has

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<sup>582</sup> See 33 C.F.R. § 20.709 (2012).

<sup>583</sup> MICHAEL P. COX, THE MODEL ADJUDICATION RULES (MARS), 11 Thomas M. Cooley L. Rev. 75, 121 (1994). ACUS Recommendation 90-4, which addresses the appeals process for Social Security disability benefit claims, provides the following recommendation:

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.

ACUS Recommendation 1990-4, Social Security Disability Program Appeals Process: Supplementary Recommendation, 55 Fed. Reg. 34,213 (Aug. 22, 1990).

completed.<sup>584</sup> In many ways, VA’s adjudicatory process is similar to SSA’s. The claimant first files his or her claim with the local VA field office, which will render an initial determination.<sup>585</sup> If the claimant is dissatisfied with the determination—for example, the claimant believes his or her claim to have been erroneously denied or that his or her disability merits a higher severity rating, or almost any other reason—he or she may appeal. When the claimant appeals to the Board of Veterans’ Appeals (“BVA” or “Board”), the Board—whose membership consists of non-ALJs—reviews the case de novo and issues its own determination.<sup>586</sup> BVA decisions, by statute, must be “based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.”<sup>587</sup> The BVA is the final administrative step within VA.

Although VA and SSA share the same basic adjudicatory structure for disability benefits, and their adjudications share similar characteristics (e.g., informal and non-adversarial), Congress has statutorily tasked VA with greater responsibility regarding record development. “An integral part of this system is embodied in the VA’s duty to assist the veteran in developing the facts pertinent to his or her claim.”<sup>588</sup> VA’s duty to assist claimants “is neither optional nor discretionary.”<sup>589</sup> Among other things, and regardless of whether the claimant is represented, VA must not only help the claimant obtain evidence not yet submitted to the agency, but also notify the claimant of any evidence “necessary to substantiate the claim.”<sup>590</sup> This duty to assist carries into the adjudication itself. VA must “consider every legal theory that could support a claim for benefits”<sup>591</sup> and “render a decision which grants [the claimant] every benefit that can be supported in law while protecting the interests of the Government.”<sup>592</sup>

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<sup>584</sup> The only context that comes close to resembling record closure is VA’s new, voluntary “Fully Developed Claims” (“FDC”) program. The FDC was jointly developed by VA and veteran’s organizations to help process claims more efficiently and reduce the agency’s claims backlog. VA describes the program “as an optional new initiative that offers Veterans, Servicemembers[,] and survivors faster decisions from VA on compensation, pension, and survivor benefit claims.” Department of Veterans Affairs, Fully Developed Claims, <http://www.benefits.va.gov/fdc/> (last visited July 22, 2013). Essentially, VA will issue a decision faster for those veterans and survivors who submit all necessary evidence when they file a claim *and* certify that they have no additional evidence to submit. See Department of Veterans Affairs, Filing an Electronic Fully Developed Claim, *available at* <http://benefits.va.gov/BENEFITS/benefits-summary/FDCElectronicCompensation.pdf>. Even in this context, record closure is a fluid concept. If VA determines that additional records exist, it will remove the claim from the FDC program and the claim will flow through the traditional claims process (which includes permitting the record to be further supplemented). See *id.*

<sup>585</sup> See BOARD OF VETERANS’ APPEALS, VA PAMPHLET 01-02-02A, HOW DO I APPEAL? 3 (2002), *available at* <http://www.bva.va.gov/docs/pamphlets/010202A.pdf> [hereinafter HOW DO I APPEAL?].

<sup>586</sup> See Daniel T. Shedd, *Overview of the Appeal Process for Veterans’ Claims*, Congressional Research Service 2 (Apr. 29, 2013), *available at* <http://www.fas.org/sgp/crs/misc/R42609.pdf> [hereinafter *Overview of Veterans’ Claims*]. The claimant may choose the less traditional method of requesting a Decision Review Officer (“DRO”) to review his or her case de novo. See *id.* If the claimant is dissatisfied with the DRO’s decision, he or she may appeal to the BVA. See *id.* at 8.

<sup>587</sup> 38 U.S.C. § 7104(a) (2012).

<sup>588</sup> *Littke v. Derwinski*, 1 Vet. App. 90, 91 (Vet. App. 1990).

<sup>589</sup> *Id.* at 92.

<sup>590</sup> 38 C.F.R. § 3.159(b) (2012); see also 38 U.S.C. § 5103(a)(1) (2012). VA must also supply the necessary forms to the claimant (free of charge). See *id.* at § 5102(a)-(b) (2012).

<sup>591</sup> *Overview of Veterans’ Claims*, *supra* note 586, at 5 (citing 38 C.F.R. § 3.103(a) (2012)).

<sup>592</sup> *Littke*, 1 Vet. App. at 92.

Not only does the agency have a duty to assist the claimant in the submission of additional evidence, but the claimant (or representative) also may continue to submit evidence throughout the adjudicatory process. Even after the determination (and any reconsideration) by field office staff, the claimant may submit additional evidence believed to be “relevant and material”—both before the BVA reviews the claim and at the hearing itself.<sup>593</sup> Once the Board has received the file from the field office, the regulations (theoretically) impose a time limit for receiving new evidence. The new evidence must be submitted “within [90] days after the BVA has received the claim file, or up until the BVA actually decides the case (whichever comes first).”<sup>594</sup> After the 90 days have passed, the claimant must establish good cause for delay in the submission of evidence.<sup>595</sup> Good cause may include, among other things, circumstances such as illness of the claimant or representative, death of the representative, or discovery of evidence unavailable until after the deadline passed.<sup>596</sup> As part of establishing good cause, the claimant must explain why such additional evidence could not have been submitted timely.<sup>597</sup> If the evidence was requested within 90 days after the BVA has received the claim file, it will be admitted into the record, regardless of whether the deadline for submission has passed.<sup>598</sup>

VA practices “allow[] development of new evidence up until the point that a final decision is signed and mailed to the Veteran.”<sup>599</sup> Even then, a “final decision” is not necessarily final. After a final decision has been issued, the claimant may reopen the record by submitting new and material evidence.<sup>600</sup> VA has a liberal reopening policy; its affirmative duty to assist applies to claimants seeking to reopen their cases.<sup>601</sup> In the words of one VA official, “This open record system is virtually unparalleled as compared to other courts or areas of administrative law, and contributes significantly to delays in the system.”<sup>602</sup>

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<sup>593</sup> See 38 C.F.R. § 20.1304(a) (2012); HOW DO I APPEAL?, *supra* note 585, at 9-10.

<sup>594</sup> *Overview of Veterans’ Claims*, *supra* note 586, at 10. Moreover, the claimant’s “identification of additional evidence after the appeal has been transferred to the Board, or the submission of new evidence[,] trigger[] additional development as a result of VA’s statutory duty to assist. [Likewise, the claimant’s] introduction of a new theory of entitlement for the first time at the Board level . . . also requires evidentiary development.” *Why Are Veterans Waiting Years on Appeal?: A Review of the Post-Decision Process for Appealed Veterans’ Disability Benefits Claims*, 113th Cong. \*5-\*6 (2013) (statement of Laura Eskenazi, Principal Deputy Vice Chairman, Bd. of Veterans’ Appeals) [hereinafter Eskenazi Testimony].

<sup>595</sup> See 38 C.F.R. 20 § 1304(b)(1) (2012).

<sup>596</sup> *See id.*

<sup>597</sup> *See id.*

<sup>598</sup> *See id.* at § 1304(a) (2012).

<sup>599</sup> Eskenazi Testimony, *supra* note 594, at \*5.

<sup>600</sup> See *Overview of Veterans’ Claims*, *supra* note 586, at 12; see also 38 U.S.C. §§ 7104(b), 5108 (2012). “New and material evidence” is “medical evidence not previously submitted to VA, which bears directly and substantially upon the issue, which is neither cumulative nor redundant, and which by itself or in connection with evidence that is already of record is so significant that it must be considered to fairly decide [the] claim.” *Quartuccio v. Principi*, 16 Vet. App. 183, 185 (U.S. App. Vet. C. 2002).

<sup>601</sup> VA has a duty under the Veterans Claims Assistance Act of 2000 to identify which evidence VA would provide and which evidence would need to be provided by the claimant. *See id.* at 187.

<sup>602</sup> Eskenazi Testimony, *supra* note 594, at \*6.

## V. GUIDING PRINCIPLES AND OBSERVATIONS: REGION I PILOT PROGRAM

In this section we conclude the report with guiding principles and observations the agency may wish to consider when assessing the status of the current pilot program in Region I, as well as and possibilities for future program revisions, improvements, and/or expansion.

### A. Guiding Principles

**First**, SSA should send a clear message about its commitment to the pilot program in Region I. Uncertainty in some quarters about the agency's commitment to the program has led to varying document submission practices among claimants or their representatives, as well as uneven application of the five-day rule by ALJs and the Appeals Council. Whatever the agency decides to do concerning this program in the future, its message should be clear. If SSA decides to keep or expand the program, the agency should provide training for, and ensure consistent application and enforcement of, such program. If it decides to eliminate the program, it should do so. Without agency commitment, the pilot program will likely continue to exhibit inconsistent application.

**Second**, when assessing possibilities for program revisions, improvements, and/or expansion, SSA should strive to attain an appropriate balance between claimant and agency interests as it pursues its goal of making the right decision on disability benefit claims as early in the adjudication process as possible. Balance must be struck between fair consideration of the claimants' cases and administrative efficiency. As one scholar writing in this area has noted: "Very few reforms will improve all dimensions of the process at once[.] Every change requires a trade-off among relevant values."<sup>603</sup>

**Third**, when determining future steps for the pilot program, the agency should gather the views of relevant stakeholders. Oftentimes, though stakeholders share the same goal of paying deserving claimants as quickly as possible, they will have different points of view regarding how to achieve that goal. Engaging stakeholders early on and thoughtfully considering their perspectives will go a long way toward ensuring the success of any revised or expanded program relating to evidentiary submission and notice requirements.

**Fourth**, SSA should strive for consistency in two respects. First, as the administrator of a national program, SSA laudably aims—to the greatest extent possible—to enforce nationally consistent rules, regulations, and practices. Pilot programs are a responsible way to test new ideas and procedures in a controlled and assessable manner;<sup>604</sup> however, they should not continue indefinitely. Allowing a pilot program, as such, to endure on a long-term basis creates unnecessary and often confusing inconsistencies, introducing special challenges for bodies—such as the Appeals Council and the NHC—that review cases from all regions. Second, the agency should ensure that the pilot program is applied and enforced consistently within hearing offices. Unless the program is consistently enforced, it is impossible to fairly assess its impact or

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<sup>603</sup> See *An Examination of the Proposed "Closed Record," supra* note 6, at 769 (internal quotations omitted).

<sup>604</sup> Implementing a pilot program "on a trial basis [is] entirely consistent with the pledge made by the original Social Security Board that a continual effort be made to 'preserve an attitude of self-criticism' and to improve the SSA hearing process on the basis of operational experience." *Id.* at 773-74.

make well-informed program decisions or assessments. To facilitate programmatic consistency, the agency should communicate the rules to ALJs and other employees (through training or other internal mechanisms) and to claimants and representatives (through notification).<sup>605</sup> The agency should take appropriate steps to make sure all those who are affected by the rules know and understand them.

**Fifth**, SSA should more closely monitor the Region I pilot program by collecting and assessing data that is tailored to capturing key aspects of this program. Current data collection is limited to nationwide case management databases developed for use in all regions. Thus, at present, generic data fields—such as percentage of cases in post-hearing status, average case processing times, and number of pending cases—must serve as stand-ins for more specific data fields related to the pilot program. While some data exist that help assess the pilot program more directly (e.g., data relating to issuance of hearing notices, volume and timeliness of evidentiary submissions, remand codes tailored to the pilot program), more robust empirical assessment of the impact of the pilot program would require more specific data.

**Sixth**, SSA would be wise to address, by whatever method it believes appropriate, the longstanding concern voiced by some—including claimants representative organizations and some ALJs—that rules regulating evidentiary submissions (such as the five-day rule) contravene an ALJ’s duty to fully develop the record, as well his or her statutory obligation to base decisions on “evidence adduced at the hearing.”<sup>606</sup> We take no position here on the proper interpretation of these legal requirements. Rather, we note this perceived tension because, for some, it appears to inhibit application and enforcement of the five-day rule and its related provisions. This is an area that calls out for agency guidance and clarification. Some ALJs—through interviews or survey responses—expressed great reluctance to disallow any evidence because they viewed limitations on evidentiary submission as running counter to their obligations. As well, claimants’ representative organizations expressed opposition to the five-day rule in interviews and written statements. To be effective, the five-day rule must be applied and consistently enforced. SSA, by clarifying the consonance of the five-day rule (which includes good cause exceptions to late submissions of evidence) with both ALJs’ statutory obligations and general principles of procedural fairness, would help to allay some parties’ concerns and, thereby, greatly aid program effectiveness.

**Seventh**, SSA should consider the rules and practices of other agencies. No adjudication system is perfectly analogous to another. Nonetheless, procedures or evidentiary exceptions used in another forum may offer ideas or approaches the agency has not previously considered.

**Eighth**, before SSA undertakes any changes, it should both consider existing circumstances and anticipate future change. These considerations are especially important with regards to obtaining medical records. The agency has undertaken an encouraging initiative—

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<sup>605</sup> One SSA official went so far as to say that closing and developing the record are not at cross purposes; rather, the biggest issue is communicating relevant standards and having everyone “on the same page” regarding the standard’s enforcement. See Senior Appeals Council Official Interview, *supra* note 169.

<sup>606</sup> 42 U.S.C. § 405(b)(1) (2011); see also *id.* § 1383(c)(1)(A) (2011). This concern has been voiced by members of Congress and the representative community (and even ALJs) at least since 1988. See APPENDIX TO REPORT ON REGION I PILOT PROGRAM, *supra* note 5, at App. C, pp. A-6 to A-8.

HIT—to facilitate the electronic receipt of all medical records. When fully implemented, this program promises to make it easier for claimants to submit medical evidence; however, the program is still in its infancy. Yet, absent additional resources, HIT is unlikely to grow quickly enough to make much of an impact. In the meantime, SSA should continue to evaluate technological changes or improvements—particularly with respect to medical records—that may better facilitate the gathering of evidence by the agency and stakeholders.

*Ninth*, SSA should consider providing clarifying guidance to both ALJs and claimants concerning application of the pilot program. For example, how much discretion do ALJs possess to disallow evidence? What are the types of considerations that generally constitute good cause? Does the five-day rule apply to evidence that did not exist before the hearing? Does the evidence submission deadline apply to briefs, the claimants’ records, or both? Does “day” end at 5:00 p.m. or midnight?<sup>607</sup> Irrespective of future revisions or modifications that SSA may decide to make with respect to the pilot program, all relevant stakeholders would benefit from guidance on these matters.

## **B. Other Observations**

In addition to the foregoing guiding principles, several other matters arose during the course of this study that warrant brief discussion. Our observations on these matters follow below.

### ***1. Evidentiary Submission and Record Closure: Good Cause Exceptions***

The framing of appropriate rules—including exceptions—concerning the timing or nature of evidentiary submissions are essential features of any adjudicatory process. Clarity and fairness are needed for effective application and enforcement. Moreover, all would agree that, there is a need for some form of “good cause” exception (or exceptions) when adjudicating Social Security disability claims. Thus, when considering the pilot program’s good cause exceptions, it is important to keep in mind what both ALJs and claimants’ representative groups identify as two of the most challenging obstacles to timely submission of evidence: (1) delays in receipt of evidence from medical providers, and (2) delays in receipt of evidence (or even knowledge of the existence of evidence) from the claimant. Should SSA move forward with the pilot program, it has a number of options to consider relating to exceptions, including retention or revision of the program’s current “good cause” exceptions at the ALJ hearing level and before the Appeals Council.

SSA could choose to implement the exceptions it proposed in its 2005 NPRM. Namely, the ALJ has discretion to hold the record open if, at the hearing, the claimant notifies the ALJ either that (1) he or she is aware of any additional evidence that could not be timely obtained and submitted before or at the hearing (but must have been timely requested), or (2) he or she is scheduled to undergo additional medical evaluation after the hearing for any impairment that forms the basis of the disability claim.<sup>608</sup> SSA could further require, as it proposed to in its 2007 NPRM, the claimant (or representative) to “submit with [his or her] additional evidence a written

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<sup>607</sup> For an example of computing time, see Rule 6 of the Federal Rules of Civil Procedure.

<sup>608</sup> See *supra* Pt. II.C.1.d.

statement that explains why [he or she] believes [he or she] meet[s the exception].”<sup>609</sup> In either case, these proposed rules contemplated that ALJs should admit evidence of which they were given notice by claimants or representatives within a reasonable timeframe before or after the hearing. These exceptions could be supplemented by requiring the claimant or representative, if possible, to inform the ALJ what they expect the evidence to demonstrate.

SSA could also adopt practice(s) or procedures akin to those used by other agencies in their respective adjudication processes. If the claimant did not submit evidence timely, the agency could require him or her to explain why the evidence was not provided earlier. If the ALJ holds the record open for a CE or admits evidence from a medical or vocational expert during the hearing, he or she might be allowed (or required) to permit the claimant to submit evidence to refute any adverse medical evidence.

Finally, in lieu of its current rule, SSA could adopt a balancing test by which adjudicators would weigh various enumerated factors in order to determine whether to admit evidence. Such balancing tests are not unfamiliar to the agency.<sup>610</sup> This option has the twin advantages of providing specific direction regarding which factors ought to be considered, while permitting flexibility by giving adjudicators discretion to respond to different circumstances differently. Such discretion is not only consistent with the nature of judging, but also provides notice to claimants and their representatives regarding which factors will be weighed to determine whether “good cause” exists to admit late evidentiary submissions into the record. Moreover, such a rule may be helpful at the appellate levels—both the Appeals Council and federal courts—since appellate decisionmakers would know the factors the ALJ must apply and thus could assess whether the ALJ applied them. Factors may include such things as: the ability of the claimant to aid his or her claim (i.e., whether he or she has a limitation that inhibited evidentiary submission); whether the claimant is represented, and if so, when the claimant retained representation; when the request for evidence was made; whether the claimant or representative was diligent in requesting evidence and seeking the ALJ’s help, if needed, to obtain it; the materiality of the “late” evidence; and any other factors that may inhibit obtaining evidence.

## **2. Data Considerations**

### **a. Data**

As previously noted, due to data limitations, we could not directly evaluate the impact of Region I’s pilot program through program-specific or program-generated data to determine whether this program was achieving its programmatic goals. If SSA decides to retain the Region I pilot program, it should collect data specifically tailored to key aspects of the pilot program in order to facilitate ongoing assessment. Such data could be captured within existing agency databases (e.g., CPMS, ARPS, eView, SDR), or through other means. New data fields might include such information as: claimant waiver of hearing notices; good cause based requests to

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<sup>609</sup> 2007 Proposed Rules, *supra* note 9, at 61,235 (this proposal applied to the appellate level, but could be introduced at the ALJ level).

<sup>610</sup> For example, when deciding the weight to give medical opinions that are not afforded “controlling weight,” adjudicators must balance six factors, including a “catch all” provision. *See* 20 C.F.R. §§ 404.1527(d), 416.927(d) (2012).



submit untimely evidence at the ALJ hearing level and disposition of such requests; good cause based requests to submit new evidence to the Appeals Council and disposition of such requests; remand codes—related to both the Appeals Council and federal court levels—specifically tailored to the pilot program (e.g., code indicating that an ALJ did not admit evidence into the record, though such evidence met a good cause exception); volume, nature, and timing of evidentiary submissions relative to hearing dates.

## **b. Technology**

SSA should make certain that the proper technology is in place to support its program. For example, it should ensure that ERE regularly refreshes so that the representative can see in real-time the material that has been included in the evidentiary file.<sup>611</sup> Having this ability would likely cut down on duplicative records. SSA should likewise ensure that ERE properly time stamps the documents so that records that have been submitted timely are not excluded from the record.<sup>612</sup> In addition, documents in the system are in TIFF format and are unsearchable. ALJs, decision writers, and case technicians could more efficiently work with the material if it was in a searchable format. Finally, a hearing office in Region I experienced a problem when the case technicians tried to choose the evidence that should be included in the record based on the time it had been submitted. Limitations existed both in CPMS itself and in the IT department's understanding of the hearing office's needs. Technology should support the rule and communication channels should exist among components in order to support people as they do their jobs.

## **3. Conclusion**

It is, of course, SSA's decision on how best to proceed with the question of whether (and how) to make permanent the Region I pilot program. Any examination of the pilot program should involve an assessment of its impact on the fair, efficient, and accurate adjudication of Social Security disability claims. The Administrative Conference believes that the Social Security Administration has the experience and knowledge it needs to decide how best to proceed with respect to the current pilot program in Region I, as well as possibilities for future program revisions, improvements, and/or expansion.

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<sup>611</sup> ERE is designed to regularly refresh; however, some claimant representatives noted that it does not always do so.

<sup>612</sup> ERE is also designed to time stamp documents. Several claimant representatives, however, stated that this does not always occur.