

REPORT TO THE GRANTS AND BENEFITS COMMITTEE ON THE SOCIAL SECURITY HEARINGS AND APPEALS PROCESS*

Jerry L. Mashaw

INTRODUCTION

This report is based on a study done by the National Center for Administrative Justice and commissioned by the Bureau of Hearings and Appeals, Social Security Administration. The Center's study was designed to analyze the hearing system available to disappointed claimants under Titles II, XVI and XVIII of the Social Security Act and to make recommendations for improvement in the accuracy, timeliness and efficiency of adjudications. The study focused almost exclusively on disability determinations under Title II and Title XVI, which comprise well over 90% of the hearing caseload of the Bureau of Hearings and Appeals (BHA). The focus of this report and its recommendations are similarly limited.

The Center's study is available to the Committee and the Conference. This report therefore will not attempt to summarize that study, nor will it be organized in quite the same way as the underlying study. Rather this report extracts recommendations from the study and provides a statement of the "basis and purpose" of the selected recommendations.

The Disability Standard and Process

The vast majority of appeals to the stage of the process considered in this Report, hearings before Administrative Law Judges (ALJs), involve the question of disability under Titles II and XVI of the Social Security Act. Disability insurance benefits under Title II are available to persons who have made specified minimum contributions to the social security system and are "under a disability." There are no gradations of disability. Either a claimant qualifies as totally and permanently (a disability lasting at least 12 months) disabled or he does not. The program is in some substantial and historical sense a program of early retirement, and benefits are the same as would be paid on retirement.

"Disability" is defined as the

inability to engage in any substantial gainful activity by reason of any

* Drawn from: J. L. Mashaw, C. J. Goetz, F. I. Goodman, W. F. Schwartz, P. R. Verkuil, M. M. Carrow, *Social Security Hearings and Appeals*, Lexington Books, 1978.

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.

This definition is then further elaborated:

. . . . an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

Under Title XVI an individual who has less than specified amounts of income and assets and is aged, blind or disabled qualifies for Supplemental Security Income (SSI) benefits. Disability is defined in exactly the same terms as in Title II.

Except to the extent that the Social Security Administration has designated certain impairments as per se disabling, disability decisions require a complex series of judgments. Those judgments begin with clinical findings and then require at least the following additional determinations: (1) the degree to which disease or trauma has produced impairments, that is, abnormalities in the claimant's physical or mental structure; (2) the degree to which these impairments result in activity losses or restrictions, usually characterized as functional limitations; (3) the degree to which the claimant's impairments and functional limitations affect the required capacities for the performance of normal roles and activities, including an analysis of attendant therapeutic limitations, environmental restrictions, energy reserve losses, and psychological overlays; (4) the interaction of the claimant's age, education, and prior work experience with his functional limitations and his responses to them, and the effect of this combination of factors on his capacity for work available in the national economy.

This elaborate determination is made through the following sequence of procedures. (The sequence described is for Title II claims. Title XVI claims determinations have slight variations that need not detain us here.) First an applicant applies at a district office of the SSA. There a claims official determines, on the basis of the claimant's prior earnings and contributions to the Social Security system, whether he is eligible for Social Security benefits. The case is then referred to a state agency, usually the state vocational and rehabilitation service, where an adjudication unit composed of a doctor and a lay "vocational specialist" develops medical and vocational evidence and makes an initial decision on the claim. If the state agency

denies the claim, the claimant is notified that he is entitled to a de novo reconsideration of his claim by the state agency. If a reconsideration is requested, the claim is reviewed by a different state agency panel.

Should the claim again be denied, the claimant is informed that he is entitled to a de novo hearing before an SSA administrative law judge appointed pursuant to the federal Administrative Procedure Act. The hearing before the ALJ is non-advisory — that is, no one represents the government. Medical reports and information concerning the claimant's work history are collected prior to the hearing by a hearing assistant. Often new medical evidence is submitted by the claimant and the ALJ may ask the claimant to have a "consultative medical examination" at government expense (either prior to the hearing or after it has been held). The hearing is used primarily to elaborate on the documentary evidence, bring it up to date and to explain the critical issue of how the claimant's medical condition affects his (or her) functioning on a daily basis. Because the administrative law judge is usually the first person to decide the case who has seen the claimant or heard any oral testimony or argument, the hearing is the first opportunity to explore the more "subjective" aspects of the claim.

There may also be present at the hearing a vocational expert, called by the ALJ to give an opinion on the vocational capacity of the claimant. This involves an analysis by the VE of the claimant's skills and his limitations, as stated by the ALJ in hypothetical form, and the formulation of an opinion concerning how those characteristics interact with the demands of particular jobs and work environments. In about 30% of the cases the claimant is represented by counsel, and quite often a family member will be present and asked to testify. In rare instances a physician will be present — either the claimant's doctor or a medical advisor called by the administrative law judge.

If the claimant loses before the administrative law judge, he is entitled to request discretionary review by the Appeals Council of the Social Security Administration. That review is conducted on the basis of the hearing record plus any new documentary evidence submitted in connection with the appeal. If the Appeals Council dismisses the request or denies the claim on the merits, the claimant may then seek judicial review in a federal district court. The district court reviews on the basis of the familiar "substantial evidence" standard. However, it is not uncommon for an offer of new and material evidence at the district court level to result in a remand to SSA.

The Problems that Occasioned the Center Study

The legislative hearings and staff reports that form the predicate for the Center's study suggest three major reasons to be concerned about the efficiency of the BHA process. The first is the backlog of cases and the corresponding inability of the current system to handle increasing numbers of appeals. This is a problem that has grown steadily over recent years. In June, 1971, median processing time for BHA hearings (from request to

disposition) was 118 days. By June, 1975, it had risen to 217 days.¹ The reasons for this increase in median processing time are not difficult to identify: 52,000 hearing requests were received in 1971; 155,000 hearing requests were received in 1975.² And while the workload increased 300%, personnel (presiding officers and support staff) increased by only 200%.³ Unless dramatic increases in efficiency were achieved, increases in processing time and "backlogs" were certain to develop.

Since 1974 the Congress and the Bureau have sought to provide more timely hearings through a series of initiatives. The Congress has temporarily made SSI hearing examiners available for processing Title II and concurrent Title II and Title XVI disability cases. There have been dramatic increases in the support staff made available to presiding officers (FY'74-1,366; FY'76-2,293)⁴ and to a somewhat lesser extent in the size of the ALJ corps (11,144 in 1974; 11,700 in 1977). Constant consideration has been given to increasing the productivity of each presiding officer. As a consequence, average case dispositions per year were up from 227 per experienced ALJ in 1975 to 302 per ALJ in 1976.⁵ With hearing requests holding relatively constant, the backlog of pending cases plummeted from 111,000 to 90,000 in 1976 alone.

The levelling off of hearing requests in FY'76 was, however, only a temporary respite. By June of 1977 hearing requests were again at an all time high (18,756 cases for that month), nearly 3,000 cases per month ahead of the Bureau's capacity to dispose of its pending caseload (15,892 cases disposed of in June 1977). Moreover, one court of appeals and several district courts have recently held that hearing delays may, of themselves, abridge a claimant's right to due process of law.⁷

A second major concern of the House subcommittee was the increasing frequency with which ALJs "reversed" the decisions of the state agencies who make initial and reconsideration decisions in disability cases.⁸ This tendency raised questions both with respect to the actuarial soundness of the social security system, a question with which this report is not concerned, and with respect to the capacity of the hearing system to achieve "correct" results. Are the ALJs correct that state agencies get almost half

1. Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, "Background Material on Social Security Hearings and Appeals", 94th Cong., 1st Sess., Sept. 17, 1975 at Table V (Hereafter "Background Material").

2. *Id.* at Table VII.

3. *Id.* at Table XII.

4. These figures are derived from Background Material, Table XII.

5. See DHEW, Operational Analysis of Bureau of Hearings and Appeals, BHA Pub. No. 032, June 30, 1976, p. 26.

6. *Id.* at p. 27.

7. The most important of these is *White v. Mathews*, 559 F2d 852 (2d Cir. 1977). The Court of Appeals affirmed a district court order which limits BHA to 120 days from the time that an appeal is filed until a decision is rendered for requests filed on or after July 1 of 1978. The current time limit is 180 days and that period drops to 150 days for requests for hearing filed on or after December 31 of this year.

8. Background Material, p. 11.

the appeals cases wrong? Or, to put the issue more generally, what assurance is there that ALJ decisions, whether they “affirm” or “reverse” prior determinations are themselves correct?

The “accuracy” issue is critical to a judgment concerning the quality of the BHA hearing process. The Supreme Court’s due process jurisprudence has consistently affirmed the importance of a procedural system’s capacity for accurate decision making both under the Constitution and under any governing statute.⁹ While substantial latitude in the design of procedural systems is legally permissible, that discretion is bounded by the demand for circumstantial reliability of the judgments produced. Moreover, the question of substantive accuracy must be confronted each time one asks whether any aspect of a procedural system is working well or might be made to work better. By “well” or “better” are almost always meant, among other things, the capacity of the system to make accurate decisions.

The third concern reflected in the subcommittee’s reports and hearings was the substantial variance in the “reversal rates” of ALJs. In the period, January-June 1974, for example, the average reversal rate for the system was 49%. But only 47% of the full-time ALJ corps were within a variance $\pm 10\%$ of that average, and a variance of ± 15 captured only 65% of the judges. At the extremes 10% of the ALJs were reversing more than 75%, or less than 25% of their cases.¹⁰

As Edwin Yourman put it: “Variations in ALJ decisions for which no explanation has been found, other than differences in individual ALJ judgment and evaluation, indicate the necessity of innovative action to improve adjudicative quality.”¹¹ A recent *New York Times* article is less circumspect. “The Social Security disability program has become, in the view of its critics, the most arbitrary of the Government’s programs to help the needy, (sic) one in which poor people in similar circumstances often receive vastly different treatment.”¹²

Finally, the BHA hearing process, like all hearings systems, has as one of its functions, the orderly resolution of conflict. Satisfying claimants that they have been fairly treated in the hearing process is an independent goal. That goal might be accomplished although significant inaccuracy and variance remained. Indeed, if the BHA caseload is dominated by “close cases,” that is, cases in which a judgment either way would be considered correct, very substantial disagreement about the accuracy of determinations, and substantial inter-judge variance, are both inherent in the system. Similarly, highly reliable determinations might nevertheless be perceived as arbitrary because of the way in which the decision process is structured.

9. *E.g., Mathews v. Eldridge*, 424 U.S. 319 (1976).

10. Background Material at Table X.

11. Yourman, “Report on a Study of Social Security Beneficiary Hearings, Appeals and Judicial Review”, in Ways and Means Committee, Recent Studies Relevant to the Disability Hearings and Appeals Crisis 153, 94th Cong., 1st Sess. (1975). (Hereafter “Recent Studies”.)

12. *New York Times*, July 27, 1977, p. 1.

Evaluation of the hearing process for Social Security claims must be attentive to all of these criteria that together define the quality of the hearing system. In addition to the questions of accuracy, consistency, speed, and claimant satisfaction, there is also the question of the direct administrative cost of the system. Suggestions for improvement of the Social Security hearing process along one or all of these quality dimensions abound. It has been proposed that BHA hearings be exempted from the formal hearing requirements of the Administrative Procedure Act, that APA qualified administrative law judges not be used to decide these cases; that the decisions be made not after "hearing", but after "examination" by a panel of experts; that the hearing process be retained, but made fully adversary; that one or another level of agency review be abolished; that judicial review be precluded or shifted to magistrates or to an Article I court; that the substantive standard be changed, or at least sharpened by the development of regulation or precedent decisions.

The general conclusion of the Center's report, and the implicit conclusion of the set of recommendations which follow, is that the more dramatic proposals for reform of the system are inadvisable, either because they are not directed at real problems or because they would be on unbalance dysfunctional, or because their effects are unknown. While the problems that have been identified by others do in various degrees infect the BHA system, the Center's study does not find that these problems are so overwhelming that an entirely new system is required. Moreover, the Center's report and this report are sensitive to the limitations on the Center's study, that is, that it was directed only to the Hearing and Appeals process, not the underlying state agency process. Radical reform of the system away from the current "hearing" model should only be proposed after a careful analysis of the state agency process has been completed. Finally, there are very few reforms that will improve all dimensions of the quality of the administrative process at once. Every change requires a trade-off among the relevant values. Hence the recommendations that follow are essentially interstitial and conservative, although in total effect they are believed to be significant.

RECOMMENDATIONS

A. Decisional Body

1. The use of APA-qualified ALJs to decide disability claims should be continued.
2. BHA should, in consultation with its ALJ corps, the Civil Service Commission, and other affected interests, clearly establish by regulation the areas of ALJ operations subject to management oversight and the agency's expectations concerning ALJs' adjudicative performance.

B. Evidentiary Development

1. Although evidence must sometimes be collected after the ALJ hearing, prehearing development often may be necessary for an informed and

pertinent exchange at the hearing. ALJs should not therefore adopt an invariant policy of post-hearing development, but should develop the record during the pre-hearing stage whenever sound discretion suggests that such development is feasible and useful.

2. BHA should experiment with wider use of pre-hearing interviews as a means for case development and in order to provide increased opportunity for grants of benefits without the necessity of a hearing. Due regard should be paid to the convenience of the claimants and to the need for a suitable record of such interviews.

3. Better use should be made of treating physicians as sources of useful information. In this regard, BHA should make more frequent use of available, standard-form questionnaires to treating physicians. And when BHA finds that consulting physicians' reports conflict with evidence supplied by treating physicians, it should inform claimants of the opportunity to have their treating physicians comment in writing on the consulting physicians' reports.

4. BHA should make better use of claimants as sources of information by (a) providing them with available state agency reasons for denial; (b) providing notice of the critical issues to be canvassed at the hearing; and (c) engaging in careful and detailed questioning of the claimant at the hearing.

5. In the absence of regulations structuring the ALJ's discretion when evaluating vocational factors, ALJs should take official notice at the hearing of vocational facts that can be established by widely-recognized documentary sources or on the basis of agency experience.

6. When vocational experts are called as witnesses they should be examined in detail concerning (a) the claimant's job-related skills; (b) the specific jobs that exist for persons with the claimant's skills and functional limitations; and (c) the number and location of jobs that the claimant can perform.

7. Claimants should never be asked to waive their rights to see and to respond to evidence developed after the hearing.

8. Congressional inquiries should be processed by BHA offices in a manner that will avoid any suggestion of preferential treatment of claimants either in the scheduling or outcome of hearings.

C. Monitoring, Management and Control of the Hearing Process

1. The Appeals Council should exercise review on the basis of the evidence established in the record before the ALJ. If a claimant wishes to offer new evidence after the hearing record has been closed, petition should be made to the ALJ to reopen the record. Where new evidence is offered when an appeal is pending in the Appeals Council, the Appeals Council should make that evidence a part of the record for purposes of the appeal only if a refusal to do so would result in substantial injustice or unreasonable delay.

2. SSA should devote more attention to the development and dissemination of precedent materials. These actions include: (a) regulatory codification of settled or established policies; (b) reasoned acquiescence or non-acquiescence in judicial decisions; (c) publication of fact-based precedent decisions; (d) periodic conferences of ALJs for discussion of new legal developments or recurrent problems.

3. BHA should continue an aggressive quality assurance program to identify errors, determine their causes and prevent their recurrence.

D. Judicial Review

When seeking a "Secretary-initiated" remand, pursuant to Section 205 of the Social Security Act, the Secretary should state the reasons for such request.

E. Representation

1. BHA offices should fully inform claimants prior to the hearing of the availability of counsel and lay representation and of the means by which they may obtain counsel or representation in their local area on a fee or no-fee basis.

2. BHA should assist and cooperate with appropriate organizations in the development of training programs for attorneys and lay representatives.

a. Recommendations Concerning the Decisional Body

1. *The use of APA-qualified ALJs to decide disability claims should be continued.*

Three criticisms may be urged against the retention of the current ALJ deciders for Social Security cases: (1) that the use of ALJs increases the formality of hearings; (2) that ALJs are too costly a resource to be used in a mass administrative justice system; and (3) that the inability to recruit and train a sufficient number of qualified ALJs contributes markedly to the delays in the Social Security Hearing Process. None of these arguments has been found to be persuasive.

Observations of Social Security hearings make clear that those hearings are remarkably free of technical, "lawyers'" formalities. In a majority of hearings the administrative law judge acts as both the principle investigator and decider with respect to the claim. He (or she) collects that information that he believes to be pertinent to the resolution of the appeal, questions the claimant and other witnesses in the hearing, and decides the case. There is no pleading, or adversary presentation, although the claimant is in some (and an increasing percentage) of cases represented by counsel. It seems unlikely that any other decider would operate in a less "formal" manner, thereby reducing delay and expense.

(2) It is difficult to estimate what the direct cost savings would be of converting the hearing process from one utilizing APA qualified ALJs to some other form of decider. The only apparently relevant experience is the

examiners when that program was enacted. Because of a Civil Service Commission belief that Congress did not intend to use ALJ deciders for SSI disability determinations, the HEW developed a register of GS-13 hearing examiners for use in that program rather than GS-15 Social Security administrative law judges. If the relevant comparison is between GS-13's and GS-15's then for a decision system of approximately 600 deciders a saving of 7.5 million dollars per year would be achieved by going to GS-13's. This cost is hardly insignificant, but in a program that dispenses over 4.5 billion dollars a year in benefits it is hardly excessive.

(3) While, the problem of developing a sufficient register of qualified GS-15 administrative law judges is currently contributing to hearing delays, that problem is not insoluble. It seems unwise to premise a change in the decision maker on the problems created by current rigidities in the Civil Service Commission process of qualification.¹³

The argument for retaining the administrative law judge in Social Security hearings is quite straightforward. The administrative law judge is, and can be seen to be, impartial. That impartiality seems to be more rather than less important now than it was in the past. As the Social Security system comes under increasing fiscal pressure, and the pressures of a rising caseload, a less clearly independent corps of deciders would have greater difficulty resisting the "institutional imperatives" to reduce both the effort expended on individual cases and the number of awards.

Of course impartiality is two-edged. It implies independence from influence generated by all side of a dispute, including government officials who are interested in increasing the productivity of the hearing process. The Administrative Procedure Act's guarantee of independence tends to strengthen the resolve of ALJs who wish, for example, to ignore BHA exhortations with respect to production levels. Thus, some frustration of agency policy occurs and some level of decision inefficiency is created as a result of ALJ independence. However, this inefficiency seems to result as much from the timidity of the agency in establishing clear standards for the guidance of the ALJ corps as it does from the "independence" of the ALJs. (This report later recommends a more active role for management.) On balance the current tension between individualized determinations by independent ALJs, and management's desires to expedite the process and hold down costs seems healthy.

2. *BHA should, in consultation with its ALJ corps, the Civil Service Commission, and other affected interests, clearly establish by regulation the areas of ALJ operations subject to management oversight and the agency's expectations concerning ALJs' adjudicative performance.*

There are wide variations in the work methods and the work products of the ALJs employed by BHA. The Center's study team observed an ALJ who disposes of around 120 cases per month and one who averages 10;

13. For a brief rehearsal of these problems see Yourman, *supra* note 11 at 143-45.

ALJs who seldom use VEs (vocational experts) and those who use them in a majority of cases. The words "MAs" (medical advisors) or "consultative examinations" could be substituted for VEs in the preceding sentence. Some ALJs do extensive pre-hearing development, some develop almost exclusively after the hearing. Some never see many of the decisions written for them by staff attorneys, others will not use a staff attorney at all. Estimates of the administrative costs per case for the judges observed suggest a variance of 300%, and quarterly statistics on reversal rates sometimes reveal variance of this magnitude.

The predictable management response to these types of variations is (1) to believe that there are better or worse products and better or worse ways of doing things — that is, that all of the judges cannot be right; (2) to seek to determine what the better products and practices are; and (3) to attempt to upgrade the products and practices of all the decisional units. Assuming that "better" can be given some substantial content and that effective management techniques are available, is it permissible to direct the activities of APA qualified ALJs to achieve management goals? And if permissible, permissible through what techniques of direction, persuasion or sanction? Phrased in the terms commonly applied in the debate within BHA, how much does the "independence" of the ALJs insulate them from management control designed to improve the overall working of the system?

The protection of ALJ decisional independence in the APA is significant. Once appointed the ALJ's position is permanent; he may be removed only "for cause" after formal adjudicatory hearing. Moreover, the ALJ's compensation is determined by the Civil Service Commission, not by his agency. Cases must be assigned in rotation, the ALJ may not be assigned tasks inconsistent with his duties as an ALJ and, with respect to the *facts* at issue in a particular case, the ALJ may not be approached by anyone, including the employing agency, save on the record. Moreover, the ALJ may not be made subject to the supervision or control of any person who has investigative or prosecuting functions for the agency.

On the other hand, certain aspects of the ALJ's activities are clearly subject to agency control. ALJ's are not "policy" independent. They represent an extension of "the agency" and the agency may control their exercise of discretion by regulation, guidelines, instructions, opinions and the like in order to attempt to produce decisions as similar as possible to those "the agency" would have made. There is no prohibition even on consultation with agency employees on questions of law or policy in a particular case.

Second, the management of an agency's adjudicatory activities is clearly the agency's responsibility. The number of examiners employed, their workloads, their staffs, their vacations, their geographic assignment and so on are obviously questions of allocation of agency resources that cannot be left to the independent judgment of individual ALJs.

But the division between prohibited actions that seek to control independent judgment in particular cases and those that simply involve effective

administration of the adjudicatory process tend to become confused in practice. ALJs often complained about BHA "pressure to produce" and intimate that they fear retaliation in the form of lack of cooperation on requests for reassignment or for new or upgraded staff positions when they fail to respond to these pressures. They also complain about administrative directions concerning the format of decisions, record-keeping and the like, that are not put in the form of regulations or even Handbook transmittals. Finally, ALJs are concerned about surveillance by the Appeals Council and the Appraisal Staff concerning ALJ production and reversal rates. In all these areas some ALJs characterize BHA's actions or powers as attempts to undermine ALJ independence.

What should be made of these complaints? Do they reveal serious problems, not just with morale, but also with the protection afforded decisional independence in the BHA hearing system? Although the "smidgen" of Supreme Court doctrine on the question of ALJ independence, the *Ramspeck*¹⁴ case, carries the clear implication that indirect pressures on ALJs by their agencies might violate the spirit of the independent structure created by the APA, none of BHA's current actions interferes with decisional independence properly understood.

The pressure to produce is not pressure to decide cases in any particular way. Moreover, it seems obvious that ALJs cannot expect a totally free hand in deciding how many cases to decide. In the limit, it seems possible to spend a month per case without being *absolutely certain* that all the evidence that could be produced is available and that the decision is correct. Whether a claimant is really disabled is a question that can be explored endlessly. BHA would be shirking its clear responsibility to provide timely adjudication if it did not attempt to make the process as expeditious as possible. It is worth noting in this regard that nothing now done by BHA, or here proposed, conflicts in any way with the ABA Commission Standards on Judicial Administration, Standards Relating to the Trial Courts.¹⁵

The subsidiary complaint about management direction not being in an appropriate form (i.e., regulations or the manual) confuses the legal requirements for promulgation of operative rules of decision, and their publication, with questions of internal management of an agency. Rules governing the substantive evaluation of claims and statements of policy having the same effect must be published and made available under the provisions of the APA.¹⁶ If they are not, they may not be used against a party (although non-regulatory matter may be used if the party has specific notice). But BHA's management directives do not contain this sort of substantive material.

14. *Ramspeck v. Federal Trial Examiners' Conference*, 345 U.S. 128 (1953).

15. See ABA Commission on Standards of Judicial Administration, Standards Relating to Trial Courts, particularly standards 2.33, 2.51 and 2.52 (1976).

16. 5 U.S.C. §552.

Although the ALJ belief in the *necessity* of regulations is incorrect, it would nevertheless seem advisable for BHA to make its policies explicit and to put them in regulatory form. The argument about the "form of BHA instructions to ALJs" has gone on for a number of years. There seems no reason to continue to provide a means by which the substantive question of agency authority and ALJ responsibility can be avoided.

b. Evidentiary Development

1. *Although evidence must sometimes be collected after the ALJ hearing, prehearing development often may be necessary for an informed and pertinent exchange at the hearing. ALJs should not therefore adopt an invariant policy of post-hearing development, but should develop the record during the pre-hearing stage whenever sound discretion suggests that such development is feasible and useful.*

2. *BHA should experiment with wider use of pre-hearing interviews as a means for case development and in order to provide increased opportunity for grants of benefits without the necessity of a hearing. Due regard should be paid to the convenience of the claimants and to the need for a suitable record of such interviews.*

While these two recommendations are distinct, there is a functional linkage between them which makes it appropriate to discuss both at once. (The "development" that is being discussed here relates primarily to the development of medical evidence. This evidence is in the form of existing medical reports from treating physicians or hospitals, elaboration on those reports by the treating physicians, and the solicitation of the views of a consulting physician, who is paid by BHA to examine the claimant and give an opinion of his condition for purposes of deciding the disability claim.)

The choice of pre-hearing as compared to post-hearing medical development turns importantly on the benefit that is thought to come from careful examination of the claimant or other witnesses at the hearing. If it is felt that the testimony of the claimant, or of a vocational expert or a medical advisor is crucial to correct resolution of the factual issues in the claim, then pre-hearing development will be favored in order that these types of witnesses can be questioned against the background of a complete medical record. To the extent that this testimony is regarded as less valuable, the incompleteness of the medical record at the time of the hearing will be regarded as less important.

Based on the observations of the Center's research team it was concluded that the hearing itself is crucial to the development of information on the claimant's functional limitations and residual capacities. The existing system for case development prior to the BHA hearing stage provides very little if any evidence on these crucial elements of the disability claim. Moreover a great majority of ALJs agree that the testimony of the claimant, or a vocational expert or a medical advisor is useful at least some of the time and that this testimony is more informative if it is given or solicited against the background of a complete medical record.

The reason some ALJs prefer post-hearing development of medical evidence, despite these considerations, is that they believe that prior to the hearing it is impossible to get an up-to-date statement of the conditions upon which the claimant relies. Consequently, development conducted on the basis of the file as it exists prior to the hearing will extend to conditions which are no longer of sufficient severity to be relevant to a finding of disability and will omit other conditions that are of sufficient importance to require a consultative examination to assess their seriousness. Presumably if there were some way to get a complete and up-to-date statement of the claimant's condition sufficiently in advance of the hearing so that appropriate pre-hearing development could be secured, many of the ALJ's now utilizing post-hearing development would develop the case prior to the hearing.

Other ALJs seem less flexible and more disposed to adopt a general stance of hearing first, development thereafter. This position is, in the study's view, inconsistent with the ALJ's duty to give the claimant a meaningful hearing. In discharging that duty each case must be separately evaluated, keeping in mind the principle that, in general, better pre-hearing development yields a more meaningful hearing.

Assuming a flexible stance that gives presumptive value to a relatively complete record prior to hearing, the ALJ must still be attentive to the problem of "wasted" development. And, pinning down the claimant's complaints requires direct contact with the claimant at a time very close to the hearing. It is not, however, crucial that this contact be with the ALJ. The Hearing Assistant or Staff Attorney could interview the claimant and elicit a complete, up-to-date version of his medical complaints. Moreover, there is no need at this stage to test the claimant's credibility by probing examination or observation of his demeanor when testifying. Consequently, this information could be elicited briefly and informally in advance of the hearing, although to avoid subsequent controversy, a suitable record should be kept of what transpires at the pre-hearing interview.

Using some form of pre-hearing interview is, of course, not a new idea. SSA regulations provide for such conferences¹⁷ and the job descriptions of staff attorneys indicate that they will conduct pre-hearing interviews. Moreover, the documents setting forth the original structure of the SSA hearing, a basic structure that has changed remarkably little over the years, relied heavily on a pre-hearing interview with claimants to inform them of relevant issues and necessary evidence and to elicit up-to-date information on their status.¹⁸

The counter argument to this proposal, which given the virtual non-existence of pre-hearing interviews must have been persuasive, is that a pre-hearing conference will cause duplication of effort for small returns. Two

17. 20 CFR §404.922a

18. See, The Monograph of the Attorney General's Committee on Administrative Procedure, Part 3, 77th Cong., 1st Sess., (Sen. Doc. No. 10, 1941).

occasions for getting together with the claimant will double the claimant's travel burden and add to BHA's administrative duties.

Nevertheless some effort to identify the relevant complaints in advance of the hearing seems desirable. The frequency of post-hearing development and the limitations upon useful questioning of witnesses that result from the incompleteness of the medical record are impressive. And, from the claimant's perspective, the value of the hearing as an opportunity to know about and meet the critical evidence concerning his claim is sharply limited by significant post-hearing development.

The pre-hearing conference can also serve other purposes. As suggested above, this might be a good occasion to provide a more focused statement of the issues and of the gaps in the evidentiary record. It might also be possible to use this conference to explore the case somewhat more fully when the Hearing Assistant or Staff Attorney thinks that a summary reversal of the stage agency may be appropriate. This now occurs in a very small percentage of cases — perhaps 1%.

Indeed this latter use might provide a critical safety valve in the current era of increasing numbers of appeals. ALJs rather consistently estimate that 10% of their cases might be granted on the record as it comes into the office without further development or hearing. But, without seeing the claimant or doing any development, the ALJs are usually unwilling to grant these claims. They fear the embarrassment of granting the claims of persons who appear robust at their hearings despite apparently serious medical complaints, or who upon investigation turn out to have wage postings that reveal substantial gainful activity.

A pre-hearing interview in these cases, soon after the file arrives at the hearing office, might satisfy these lingering doubts and permit a substantial number of grants on the record. If the number of such dispositions reached the ALJ's consistent estimate, these grants would represent almost the difference between the current rate of filings and the current rate of ALJ dispositions.

3. Better use should be made of treating physicians both as independent sources of useful information and as a check on the findings of consulting physicians.

There appears to be widespread dissatisfaction among ALJs and medical advisors with the reports submitted by treating physicians and with the quality of hospital records. The critical question, however, is whether expenditures to improve the quality of this information will be most cost-effective than alternative means of ascertaining the claimant's condition. Present practice, at least implicitly, embodies the judgment that expenditures for independent consultative examinations are likely to be more productive than those designed to elicit better information from the treating physician. ALJs rather consistently believe that consulting physicians are less biased and more expert than treating physicians, although the latter have a decidedly better opportunity to observe the claimant. And while

courts with some frequency remand cases that credit consulting physician reports more heavily than treating physician reports,¹⁹ the ALJs remain unrepentant.

To the extent that securing greater detail as to the findings underlying the opinion of the treating physician involves hearing him testify at the hearing the costs would probably exceed the benefits. Hearing times and delays would obviously be increased. For most claimants "the treating physician" is a euphemism for many doctors seen in various clinics and hospitals, perhaps over many years, and often with no "personal" relationship with the patient. Finding these physicians, inducing them to testify and scheduling their appearance would be a formidable task.

A less costly alternative is routine issuance of available, standardized interrogatories to treating physicians. The major advantage of these questionnaires is that they elicit the treating physician's opinion concerning functional limitations in a form that is usable by the ALJ. Responses to interrogatories thereby supply evidence that is often either missing or in an unusable form ("This man cannot work") in treating physician reports.

A connected issue is how consultative examination reports should be evaluated, particularly when they conflict with the reports of treating physicians. This is a critical question because the report of a consultative examination tends to be the most powerful piece of evidence in cases where such reports appear. It responds to questions put by the ALJ after reviewing the file and, many times, after hearing. It may evaluate the prior medical evidence, and it will often contain the only reasonably detailed information on functional limitations that is available other than the claimant's own description of his activities. Moreover, claimants are poorly positioned to rebut or explain consulting physician reports in general and are virtually excluded from comment when consultatives are used at post-hearings.

The question then is how to fit the consultative examination into the present system — a system that presumes that the ALJ is the decider that the consultative examination report is but one piece of the relevant information, and that it, like all other information, needs to be analyzed, evaluated and weighed against the other evidence. In such an effort several actions seem worth exploring. First, so long as a consultative request is being sent out anyway, there seems no particular impediment to sending the same request to treating physicians, at least in cases where the consultative is not designed to develop information on an ailment not previously diagnosed and treated. Second, where there is a conflict in the treating physician versus consulting physician reports, it might be useful to submit the latter to the treating physician for comment. He is in a much better position to evaluate the consultative examiner's report and, in the light of those findings, to supplement or explain his prior statements, than anyone else in the system. And, he is almost never available to testify at the hearing. While

19. See, e.g., *Davidson v. Gardner*, 370 F.2d 803 (6th Cir. 1966).

submission of the consultative examiner's report to the treating physician would cause some delay, the cases where substantial conflicts arise are not so numerous that the overall timeliness of the hearing system would be substantially affected. Since BHA perceives problems in its relations with physicians were it to do this directly, and would in any event need the claimant's permission, it seems sensible merely to make certain that a claimant is apprised of the opportunity to have his treating physician comment on a consultative report.

4. *BHA should make better use of claimants as sources of information by (a) providing them with available state agency reasons for denial; (b) providing notice of the critical issues to be canvassed at the hearing; and (c) engaging in careful and detailed questioning of the claimant at the hearing.*

The assumption of present practice is that little reliance can be placed on the claimant to develop the medical evidence or to organize his own testimony in a fashion which is responsible to the issues in the case.

It is no doubt true that claimants, both because of their lack of education and their unfamiliarity with legal proceedings perform these jobs in a fashion that is inadequate without substantial additional effort by the ALJ and his staff. It is unclear, however, how much the "shortcomings" of claimants (and their attorneys) are a result of their not knowing what the critical issues are. Although admittedly self-serving, lack of notice of the real issues is a repetitive complaint of attorneys and claimants.

Without attempting to analyze proposed changes in the state agency reconsideration process that would provide a much more extensive explanation of the grounds for denial (and that are beyond the scope of this study) we should nevertheless note that there are two existing indications of what issues are important in a disability hearing that are not furnished to the claimant or to his attorney. The first is the state agency decision on reconsideration. (This is, however, sometimes in the exhibit file. But that file is examined, in the usual case, only immediately prior to the hearing.) Nor does the claimant or his attorney get the formulation of the issues which most ALJs, or their hearing assistants, prepare as a guide to their conduct of the hearing. Both of these existing formulations would be very helpful in focusing the efforts of the claimant or his attorney, and could be provided at very modest cost. (Of course, the provision of a more focused notice of hearing issues must be attentive to the need to avoid the appearance of prejudging the case.)

The reconsideration decision of state agencies is sometimes criticized for its incompleteness or lack of rationale. The point remains, however, that the information that is available through those decisions vastly exceeds that currently transmitted in the form notice of denial. Moreover, the response made by BHA to a similar GAO suggestion - that a test of specific notice of grounds for denial has revealed no change in the *incidence* of appeal - misses some important points. The potential gains from better

information also include better self selection as to *which* cases are appealed and improvements in the *quality* of the evidence in appealed cases.

There may also be significant gains from eliminating the very wide variance in the way that ALJs conduct the heart of the hearing — the questioning of the claimant. At the extremes, one ALJ observed uses the hearing almost exclusively to determine whether the documentary record is complete. His questions involve asking the claimant only whether he has any additional complaints, whether any of the complaints that appear in the record have subsided or become worse, and whether he has had any further treatments by doctors or hospitals. He may also ask whether the claimant has been looking for work, and whether he has been employed after the time he made his application for benefits. After that, the judge asks only whether the claimant has something else that he wants to say, and that is that. These hearings are the substantial equivalent of the prior proposal for a pre-hearing interview.

At the other extreme is a judge whose hearings routinely last between 2 and 2½ hours. He goes through a very extensive list of questions about the claimant's medical problems, daily activities and the like and in the process he repeats orally much of what is in the written record. The question, of course, is which of these techniques or approaches is more appropriate for Social Security disability hearings?

The hearing should, in my view, tend toward the more intensive questioning end of the spectrum of ALJ practice. The reasons for this belief are the following:

First, the question of what functional limitations result from the claimant's medical condition is the most difficult one faced in disability cases. None of the experts who provide evidence is really trained to address this question. Doctors diagnose illness from the point of view of prescribing treatment. They have no particular training or experience in relating symptoms of disease to vocationally relevant functions. Moreover, the doctor is often treating one of several conditions and therefore does not consider the consequences of all of them on the individual's ability to function.

The VE knows what the requirements of various jobs are. But he (at least as traditionally conceived) does not know how to translate clinical findings into functional impairments. The ALJ must therefore piece together the puzzle of the claimant's residual capacities as they relate to existing opportunities in the work force, utilizing the evidence supplied by these experts and his own insights gained by observing the claimant and questioning him concerning his daily activities. Absent a shift to a radically different evaluation procedure involving sustained medical, functional and vocational testing of all claimants in centers specially designed for the task,²⁰ or systematic investigation of claims by trained investigators, the

20. This is the overall solution suggested by Robert Dixon in his study of the Social Security hearing process entitled "Social Security Disability and Mass Justice: A Problem of Welfare Adjudication" (1973).

ALJ's development of facts bearing on the claimant's functional capacities will remain an important, perhaps crucial, step in the disability determination process. Consequently detailed questioning of the claimant seems an indispensable component of an effective hearing.

Second, the records are often very scanty with respect to work histories. No one in the system above the district office level develops that evidence carefully and it will almost certainly have to be developed at the hearing. Even if the work history is formally complete, what the claimant really did within his job classification does not appear from the bare record.

Third, if the hearings are meant to be an individualized inquiry into how this claimant's functioning is impaired by his medical conditions, then that evidence must almost certainly come from the claimant himself, or people who come in contact with him in his daily living. Since in most hearings there is no one there other than the claimant to testify to his daily activities (who does not also have an interest in the success of the claim), it seems imperative that ALJs draw out of the claimants, in great detail, information about how they function with their limitations. This is the crucial arena for credibility judgments by ALJs. Moreover, it seems clear that such judgments *will necessarily be made*, whether or not the claimants situation is fully explored by the ALJ.

Fourth, given the capacities of claimants and, in the Center team's observations, their attorneys, only the ALJ is likely to appreciate the necessity for detailed testimony and to elicit it in relevant form. Fifth, the capacity of denial decisions to stand up on judicial review may depend critically on the existence of testimony at the hearing that justifies a finding of sufficient residual capacity to engage in substantial gainful employment.²¹ The case file often contains multiple findings of "disability"

21. Two recent cases from the Fourth Circuit illustrate this point. The claimants in the two cases reflect remarkably similar complaints, abdominal pain, fatigue and dizziness. Both were males and 50 years of age. Both had been fully employed for most of their lives: one principally as a truck driver, the other as a machine feeder in a dry cleaning plant. The only substantial variation in the fact pattern was in transferable job skills. One of the claimants, Robert L. Lewis, had a high school education and had been a Sergeant in the Marine Corps as well as a truck driver. The other claimant, Robert L. Stokes, had only a 4th grade education and had worked only as a janitor in addition to his work feeding machines in the dry cleaning plant. Both claimants were ruled not to be disabled by the Administrative Law Judge. Surprisingly, the better educated claimant with more training, Lewis, had his case reversed outright by the Fourth Circuit Court of Appeals. The Stokes case was affirmed on appeal by the District Court in Baltimore.

Upon reviewing the opinions and the records in both of these unreported cases, one comes inescapably to the conclusion that the only difference in the cases is how the Administrative Law Judge conducted the hearing. In the Lewis case, the ALJ developed no evidence with respect to daily activities or functions. That left in the record a treating physician's report which stated that the claimant could not work. Since that was the only evidence available, the Court of Appeals was correct at least to remand, although one would think not to reverse the case outright. In the Stokes case, on the other hand, the Administrative Law Judge developed the ordinary daily activities evidence quite completely. On that basis it was obvious that the claimant had the residual function of capacity sufficient to carry out a number of jobs.

by treating physicians, other support programs and state vocational rehabilitation centers. Without a solid basis for a contrary conclusion, spread on the hearing record, courts are likely to remand, or even reverse ALJ decisions outright.

Sixth, with respect to many of the cases observed, one came away uncertain whether the case should be decided at all on the record as developed. There were simply too many loose ends in the evidence that had not been pursued in the hearing. Of course, it's always true that there will be questions of judgment involved, and perhaps inconsistencies in the evidence, even if the case is well developed. But the point is that a well developed case reduces the range of doubtful facts. A poorly developed case, particularly as it relates to residual capacity, seems to require the ALJ to operate on the basis of broad rules-of-thumb about medical conditions. It is not surprising therefore, to find that the Appeals Council encounters, as a consistent problem with ALJ decision adequacy, a tendency to rationalize denials on the basis of failure to meet or equal the per se categories of disability prescribed by regulation.²²

Finally, it is very easy to get a serious misimpression about functional limitations from a claimant's initial response. The ALJs, if they are going to develop this evidence responsibly, must pursue it in great detail. For example, in one observed case, involving a claimant whose major complaints were arthritis and shortness of breath, the ALJ had begun a line of questioning involving daily activities. One of his questions involved how the claimant did her laundry, where the washing machines were in relation to her apartment and the like. The claimant volunteered in the course of the questioning that often the elevators in her apartment building did not work and she therefore had to carry her laundry eleven flights of stairs, up and down, in order to wash it. This sounded like extremely damaging evidence in terms of the claimant's functional limitations. However, the ALJ was not satisfied with leaving the evidence at that level. He then asked how long it took the claimant to carry her wash from the basement to her apartment and how often she had to rest in going up and down with a load of wash. It turned out that, if the claimant is to be believed, it took nearly an hour to get from the basement to her apartment with a load of wash. She had to stop on every landing and quite often she had to stop and sit on the stairs between landings as she carried the wash up.

5. In the absence of regulations structuring the ALJ's discretion when evaluating vocational factors, ALJs should take official notice at the hearing of vocational facts that can be established by widely-recognized documentary sources or on the basis of agency experience.

Assuming that the claimant's functional and/or environmental limitations can be determined, and that those limits preclude return to his prior

22. This problem seems to be picked up primarily in the "Peer Review Reports" but not in the Statistical Quality Review.

work, the ALJ must then address the question of how those limitations, combined with the so-called "vocational factors" — the claimant's age, education and prior work experience — affect the claimant's ability to perform other jobs in the national economy. Several sources of enlightenment are available to the ALJ in making this determination. One is his own past experience in deciding disability cases. Another is the standard reference works and data sources that describe existing job categories; the educational, exertional and skill requirements of various jobs; and the number of such jobs in the local and national economy. A third is expert testimony by job counselors, vocational rehabilitation counselors or others having knowledge of the labor market and the demands of various jobs. In response to judicial decisions, and BHA instructions based on those decisions, ALJs have increasingly relied on the third source of information.

The Carter's study suggests that this practice is unnecessary and, therefore, wasteful. The basic doctrinal position concerning VE testimony is that it *may* be required to support a denial of benefits if the ALJ finds the claimant unable to perform his previous work.

The major case in the area is *Garrett v. Richardson*,²³ in which the 8th Circuit reversed the district court's affirmation of denial of benefits. The ALJ had supported his denial, not with vocational testimony, but with the statements of two doctors. One had reported that the claimant, while unable to perform his former job, should be able to tolerate a "light to moderate job situation." The other had reported that there was no "obvious reason why this patient could not be employed."²⁴

The Court of Appeals held that these opinions were too general to constitute substantial evidence of the claimant's ability to engage in substantial gainful activity. The Court stressed that no VE had testified, that there was no vocational report in the record, and that there was a total lack of testimony concerning what type of light to moderate work the claimant could perform consistent with his age, education, and work experience.

While the Court recognized that the claimant had the burden of proving his disability,

once medical reports have been introduced substantiating a medical impairment, and the claimant having testified that he is unable to work, it would be beyond the realm of reason to further require the claimant, who is not represented by an attorney, who is sixty years of age with a third-grade education, and who if not financially distraught, would not be asserting a claim for benefits in the first place, to produce a vocational counselor to testify that there are no jobs in the national economy which he can perform. *The burden of producing such a person must rest with the hearing examiner and in the absence of substantial evidence from other sources bearing directly on the issue of*

23. 471 F.2d at 598 (8th Cir. 1972).

24. 471 F.2d at 603.

*“substantial gainful activity,” the testimony of a vocational counselor is essential for an affirmance of an examiner’s findings.*²⁵

Although *Garrett* notes that a VE is required only in the absence of other vocational evidence, it, and its progeny, nevertheless suggests the necessity for vocational testimony in a very large percentage of cases. First, most claimants have applied for benefits because they were unable to continue with their former work. Second, the “vocational evidence” alternatives to “vocational testimony” are quite limited. There is generally no thorough vocational evaluation performed by the state agencies. And while physicians’ reports in the file often make comments on vocational factors, the legal efficacy of the evidence is constrained.

The Fourth Circuit has, for example, flatly rejected the possibility that the Secretary could meet his burden of proof solely by medical opinions.²⁶ Although the *Garrett* court and other courts have not gone so far, they have sharply restricted the use of medical opinions as vocational evidence. The consensus among many courts is that the medical opinion itself must be based on substantial evidence, including findings as to the claimant’s functional limitations and the specification of jobs having requirements the claimant can satisfy. The degree of specificity required under this approach would seem to go much beyond the clinical findings of most treating or even consulting physicians. Moreover, such an assessment of the claimant’s job capacity would seem to require consideration of the claimant’s age, education, and work experience, and determination of the transferability of his skills. These functions would appear to be outside the average physician’s area of expertise, if not competence.

Even if specific medical evidence to support a finding of job performability is obtained, the ALJ must still determine that the job said to be performable is one which exists in significant numbers either locally or nationally. This seems an issue about which the average doctor will have no knowledge whatsoever. Nonetheless, the determination must be supported by substantial evidence that comes from some source. This suggests the second way to sustain an existing-performable job finding without relying on VE testimony — administrative notice.

Many courts have found it proper for the ALJ to officially notice the existence of jobs, either locally or nationally, that vocational or specific medical testimony has established to be within a claimant’s capacities. Thus, where it was undisputed that the claimant could engage in “an infinite variety” of nonspecified light jobs, the court held that the existence of such light work was such an “obvious fact” that it did not require evidentiary support.²⁷

25. 471 F.2d at 603-04 (emphasis supplied).

26. 442 F.2d at 803 (D.C. Cir. 1971).

27. *Breaux v. Finch*, 421 F.2d at 687 (5th Cir. 1970). (With an important caveat by the Court that administrative notice might not be proper had the claimant’s disability limited the types of light work which could be performed. See also, the dictum in *Chavies v. Finch*, 443 F.2d at 356 (9th Cir. 1971).

If done in an appropriate fashion it seems that ALJs could and should take official notice much more often than they do currently, both of the characteristics of jobs that a claimant can perform and of the existence of those jobs in the national economy. The APA provides the general official notice standard in §556(e): "When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." This provision would appear to give an ALJ broad authority to notice facts. There are, however, judicial opinions that limit the scope of this provision in the context of SSA disability decisions.

The main impediment is *Meneses v. Secretary, HEW*,²⁸ a divided opinion that nevertheless has not been overruled or rejected. In *Meneses*, Judge Leventhal states that an ALJ cannot use his "common knowledge" to assume that the tasks of radio technicians are light work and further that such jobs are available. Judge Leventhal concluded:

Assuming that it is common knowledge that there are jobs available in the national economy for high school graduates with radio technology credits, we do not think it is subject to judicial notice, and the record is devoid of evidence on whether or to what extent there are significant numbers of jobs in the national economy which could be filled by a person with plaintiff's limited training and suffering from his sort of Class III heart condition.²⁹

While Judge Tamm dissented on this official notice of common facts issue, it is not necessary to confront the official notice question "head-on" to restrict the applicability of *Meneses*. In fact, the ALJ failed in *Meneses* to establish any basis for official notice of job availability. He did not refer to specific documents (the Dictionary of Occupational Titles plus local newspaper ads, Labor Department "job bank" books and the like) that show that light work jobs (like radio technicians) are available nor did the ALJ rely on relevant experience with prior cases. The important point here is that Judge Leventhal did not in his opinion require that vocational *testimony* be produced. The situation might be entirely different where a basis for notice has been presented in the form of "noticed" documents or agency experience.

There is support for the use of a "document based" official notice in two earlier disability cases that upheld Appeals Council use of officially noticed medical texts and employment opportunity publications.³⁰ In *McDaniel v. Celebreeze*, for example, the Appeals Council had noticed the Dictionary of Occupational Titles (among other texts—all listed in note 2 of the opinion) and the court held:

28. 442 F.2d 803 (D.C. Cir. 1971).

29. 442 F.2d at 809.

30. See *Moon v. Celebreeze*, 340 F.2d 926 (7th Cir. 1965). *McDaniel v. Celebreeze*, 331 F.2d 426, 428-29, (4th Cir. 1964).

We are of the opinion that the action of the Appeals Council in noticing and considering the publications mentioned in its opinion does not require that the decision of the Secretary be reversed. Sections 205(a) and (b) of the Social Security Act implicitly authorize consideration of this type of evidence. The procedure followed by the Appeals Council conforms with §7(d) of the Administrative Procedure Act. In accordance with the provisions of this Act the claimant's counsel was afforded an opportunity to challenge and to contradict the publications considered by the Appeals Council.³¹

In keeping with §556(e), the ALJ must, of course, alert the claimant to the use of such notice and offer opportunity at the hearing (and perhaps by further submissions thereafter) to challenge and rebut the accuracy of the documents noticed.

Nor is "document based" notice the only feasible "administrative notice" in disability cases. The Attorney General's Report on Administrative Procedure states:

But if the information has been developed in the usual course of business of the agency, if it has emerged from numerous cases, if it has become a part of the factual equipment of the administrators, it seems undesirable for the agencies to remain oblivious of their own experience and strip themselves of the very stuff which constitutes their expertness. It appears far more intelligent, if fairness to the parties permits, to utilize the knowledge that comes from prior acquaintance with the problems. Laborious proof of what is obvious and notorious is wasteful; or, in the alternative, decision in disregard of the obvious and notorious in absence of such laborious proof, is foolish, and contrary to the demands that decisions be as correct as possible.³²

Reviewing courts have often allowed other agencies to rely on their past experience where that experience contained circumstantial guarantees of reliability — such as, repeated exposure to the problem. The discussion by the Sixth Circuit Court of Appeals in *Dayco Corp. v. FTC* is instructive:

The FTC cites as a precedent for its action here its own decisions in *Manco Watch Strap Co., Inc.*, 60 FTC 495 (1962). That involved a charge of unfair trade practice arising from the "sale of watch bands not adequately marked in the packaging thereof or otherwise with the country of origin." While there was evidence in the particular case on the point, the Commission appears to have taken official notice of the fact that Americans prefer American made goods and, in the absence of clear markings otherwise, assume that goods are of domestic origin. Relying upon its relevant knowledge acquired in a long line of cases,

31. 331 F.2d at 428.

32. Atty. Gen'l's Report, Administrative Procedure in Government Agencies 72 (1941).

the Commission held that it had the right to take official notice of the above habits of the American buyers. It said:

“If this were the first foreign-origin product case to come before the Commission, the conclusion that a substantial segment of the public assumes that unmarked watch bands are American-made and prefers such domestically-made bands would have to be based on specific evidence. But this is not a case of first impression; rather it *follows scores, if not hundreds of others involving fundamentally the same general factual issues.*” (emphasis supplied)

The quoted language at once distinguishes *Manco* from this case, where the basic official notice was taken from the evidence of a single case which did not deal with general accumulated knowledge of the buying habits of American people but with the method of operation of one business enterprise, Automotive Jobbers, Inc.³³

Similar practices by experienced ALJs would seem, not only permissible, but desirable on grounds of both administrative cost reduction *and fairness to claimants*, as compared with the current manner in which vocational testimony is commonly elicited.

Official notice could contribute to the fairness of the decisionmaking process by specifying precisely what evidence or assumptions the ALJ is relying upon in concluding that the claimant is able to engage in substantial gainful employment. This would permit a more focused response than is likely with respect to VE testimony that is now elicited by the ALJ by means of a series of hypothetical findings concerning the claimant's functional limitations. In that process it is often difficult for the claimant to identify a hypothetical person who represents his characteristics as he perceives them and even more difficult to question the judge's expert. Were the ALJ to describe to the claimant, however, what the ALJ took the claimant's residual capacity to be and then point out the jobs from the ALJ's experience or from documentary sources that seemed to be within the claimant's abilities, a dialogue might be possible in which the claimant explained why he thought such jobs were or were not possible for him.

The administrative cost reduction is obvious. At the present time the situation seems quite bizarre. The prevailing view of people familiar with the system is that VE testimony is not worth nearly the costs it entails. Indeed it is widely believed that it often adds nothing to what the ALJ already knows.

This is not, of course, to say that vocational testimony is never useful or that claimants would uniformly be benefited by a sensitively employed system of official notice. It is to say merely that, on balance, the view that vocational factors must be assessed in each case by a “vocational expert” is unsound. This view is supported by the recently proposed regulations on the

33. 362 F.2d at 186.

evaluation of vocational factors.³⁴ Those regulations, relying on published sources and agency experience,³⁵ establish a "grid" which portrays various combinations of age, education, work experience (skill levels) and functional limitations, and assigns a conclusion — disabled or not disabled — to each combination.³⁶ Should these regulations be adopted vocational

34. 43 Fed. Reg. 9284, March 7, 1978. A draft of such regulations was approved by Commissioner Cardwell on April 5, 1976. See generally, Subcommittee on Social Security, House Ways and Means Committee, Reports of Consultants on Actuarial and Definitional Aspects of Social Disability Insurance. 94th Cong., 1st Sess., 1976.

35. 43 Fed. Reg. at 9307.

36. The text of the regulation can be portrayed in tabular form. The following example is the tabular representation of the decisions required with respect to persons who are found to have the functional capacity to do only "light" work as defined in the dictation of Occupational Titles.

TABLE NO. 2.—RESIDUAL FUNCTIONAL CAPACITY MAXIMUM SUSTAINED WORK CAPABILITY LIMITED TO LIGHT WORK AS A RESULT OF SEVERE MEDICALLY DETERMINABLE IMPAIRMENT(S)

Rule	Age	Education	Previous work experience	Decision
202.01	Advanced age	Limited or less.	Unskilled or none.	Disabled.
202.02	do.	do.	Skilled or semiskilled— skills not transferable.	do.
202.03	do.	do.	Skilled or semiskilled— skills transferable ¹ .	Not disabled.
202.04	do.	High school graduate or more—does not provide for direct entry into skilled work ¹ .	Unskilled or none.	Disabled.
202.05	do.	High school graduate or more—provides for direct entry into skilled work ² .	do.	Not disabled.
202.06	do.	High school graduate or more—does not provide for direct entry into skilled work ² .	Skilled or semiskilled— skills not transferable.	Disabled.
202.07	do.	do. ²	Skilled or semiskilled— skills transferable ¹ .	Not disabled.
202.08	do.	High school graduate or more—provides for direct entry into skilled work ² .	Skilled or semiskilled— skills not transferable.	do.
202.09	Closely approaching advanced age.	Illiterate or unable to communicate in English.	Unskilled or none.	Disabled.
202.10	do.	Limited or less—at least literate and able to communicate in English.	do.	Not disabled.

testimony would be necessary thereafter only in cases where the "grid" system was inapplicable (for example, claimants with environmental rather than functional limitations) or where the ALJ felt himself incapable of translating the facts of the case into the grid categories (for example, because of a peculiar work history that rendered the claimant's skill level problematic).

The so-called "grid regs" are an extension of the principle of official notice herein suggested. They require that notice be taken by establishing as a matter of law that certain combinations of characteristics yield determinate outcomes. Official notice in individual cases would be rebuttable and would be more focused on particular jobs that the claimant might perform. The Conference does not take a position, or "comment", upon the proposed regulations. The current proposal merely suggests another means of attaining similar objectives — more uniform decisionmaking at less cost, while maintaining the claimant's right to an individualized hearing on his particular situation.

6. *When vocational experts are called as witnesses they should be*

TABLE NO. 2.—RESIDUAL FUNCTIONAL CAPACITY MAXIMUM SUSTAINED WORK CAPABILITY LIMITED TO LIGHT WORK AS A RESULT OF SEVERE MEDICALLY DETERMINABLE IMPAIRMENT(S)
(Continued)

Rule	Age	Education	Previous work experience	Decision
202.11	do.	Limited or less.	Skilled or semiskilled— skills not transferable.	do.
202.12	do.	do.	Skilled or semiskilled— skills transferable.	do.
202.13	do.	High school graduate or more.	Unskilled or none.	do.
202.14	do.	do.	Skilled or semiskilled— skills not transferable.	do.
202.15	do.	do.	Skilled or semiskilled— skills transferable.	do.
202.16	Younger individual.	Illiterate or unable to communicate in English.	Unskilled or none.	do.
202.17	do.	Limited or less—at least literate and able to communicate in English.	do.	do.
202.18	do.	Limited or less.	Skilled or semiskilled— skills not transferable.	do.
202.19	do.	do.	Skilled or semiskilled— skills transferable.	do.
202.20	do.	High school graduate or more.	Unskilled or none.	do.
202.21	do.	do.	Skilled or semiskilled— skills not transferable.	do.
202.22	do.	do.	Skilled or semiskilled— skills transferable.	do.

examined in detail concerning (a) the claimant's job-related skills; (b) the specific jobs that exist for persons with the claimant's skills and functional limitations; and (c) the number and location of jobs that the claimant can perform.

In many of the hearings observed during the Center's study the administrative law judge when questioning a vocational expert failed to enquire in any detail about one or all of the subject matter areas indicated in the recommendation. As a consequence although the records in those cases contained the testimony of a vocational expert, they really do not establish the factual chain necessary for the inferences that the administrative law judge must make in rendering his decision. More importantly because these questions are not examined in any detail the claimant has no opportunity to question or respond to vocational testimony which may be damaging to his case.

The support for this recommendation is somewhat anecdotal. The persons on the Centers Study team who observed hearings cannot be certain that in those cases in which vocational experts were questioned at only a general level further specificity would have produced important evidence either from the vocational expert or from the claimant in response to the expert's testimony. The observers are certain, however, that there was a substantial difference in the level of confidence that could be had that the record truly reflected a claimant's functional limitations and work experience when there was good, specific use of vocational testimony and when there was not.

To give one example: One hearing was observed in which the vocational expert testified, in response to a general question about available jobs for that claimant, that she might well be able to do "benchwork". The administrative law judge then followed up on that question by asking for a description of benchwork and exactly what operations were involved in it. The ALJ further asked how long one had to sit in one position at the bench, whether positions could be changed from sitting to standing, whether legs could be raised and kept raised while working at the bench, whether it was possible to leave the bench periodically in order to move about and the like. All of these questions related to specific functional impairments that afflicted the claimant. The picture that emerged from this careful questioning was much different than the VE's initial confident assertion that the claimant could do benchwork. Moreover having had this explanation of what benchwork was, the claimant was then in a position to testify about a job that she had previously done, which was not reflected in the record, and which was in fact benchwork. The claimant had had to quit that job because of a number of medical problems that were exacerbated by the work.

7. Claimants should never be asked to waive their rights to see and to respond to evidence developed after the hearing.

Although it is previously recommended that development of the medical evidence take place prior to the hearing rather than after the

hearing, it is inevitable that some cases will require development after the hearing has been held. Quite often this post-hearing development will take the form of a report of a consulting physician or perhaps responses to interrogatories by a consulting physician or medical advisor. This evidence, because it is responsive to uncertainties experienced by the ALJ at the conclusion of the hearing, is likely to be critical in determining the outcome of the case. Moreover, supplemental hearings are very rare. Given the pressure of the caseload, ALJs are very resistant to reconvening a hearing merely to set reactions to newly-acquired evidence. The claimants' means for testing unfavorable post-hearing evidence are limited, therefore, in almost all cases to written cross interrogatories and comments. (It should also be re-emphasized here that many of the problems sought to be cured by profert might be avoided by pre-hearing conferences — even telephone interviews — that revealed the need for a consultative evaluation.) Although that opportunity may be utilized quite infrequently, particularly by unrepresented claimants, this evidence seems too important to have it considered without the claimants at least having an opportunity to comment upon it. The practice of some administrative law judges of asking claimants to waive their right to see subsequently developed evidence seems, therefore, to be highly objectionable.

8. Congressional inquiries should be processed by BHA offices in a manner that will avoid any suggestion of preferential treatment of claimants either in the scheduling or outcome of hearings.

The Bureau of Hearings and Appeals both in its national office and in its hearing offices receives a large number of Congressional inquiries each year concerning the status of cases. It is uniformly believed by BHA personnel that these inquiries provide little or no useful information concerning claims and require considerable amounts of BHA personnel resources to respond to them. It also appears that, although all ALJs steadfastly assert that Congressional interest has no bearing on the outcome of the case, some ALJs do admit that claimants are given earlier disposition in response to Congressional interest. That Congressional inquiries speed processing time is certainly widely believed by Congressmen. It is impossible to advance a legitimate reason why a Congressional inquiry should influence the amount of delay to which a particular claimant is subjected.

While it certainly is unlikely that BHA could convince the Congress to stop carrying out its traditional casework function by making inquiries with respect to Social Security cases, it does seem possible to insulate administrative law judges from these requests for information and to thereby avoid any possible favoritism that might result. One ALJ interviewed in the Center's study has completely isolated himself from Congressional influence. Congressional inquiries are answered by a member of his staff who is instructed not to mention the matter to the ALJ and to keep the Congressional correspondence out of the case file that the ALJ reviews. This solution is worthy of adoption as a general policy. If Congressmen can be kept

informed (and in that way claimants reassured that they have not been lost in a vast bureaucracy) without running the risk of having favoritism shown to claimants who are the subject of Congressional inquiries, there seems to be no reason not to handle all Congressional inquiries in this fashion. Those rare cases in which the Congressional communication provides relevant information concerning the merits of the case can be handled as an exception to this general policy of insulation.

c. Monitoring, Management and Control of the Hearing Process

1. *The Appeals Council should exercise review on the basis of the evidence established in the record before the ALJ. If a claimant wishes to offer new evidence after the hearing record has been closed, petition should be made to the ALJ to reopen the record. Where new evidence is offered when an appeal is pending in the Appeals Council, the Appeals Council should make that evidence a part of the record for purposes of the appeal only if a refusal to do so would result in substantial injustice or unreasonable delay.*

Current regulations governing review by the Appeals Council provide:

§404.947a Basis for review of the presiding officer's decision or dismissal by Appeals Council.

(a) The Appeals Council, on its own motion or on request for review, will review a hearing decision or dismissal where:

- (1) There appears to be an abuse of discretion by the presiding officer;
- (2) There is an error of law;
- (3) The presiding officer's action, findings, or conclusions are not supported by substantial evidence; or
- (4) There is a broad policy or procedural issue which may affect the general public interest.

(b) Where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the presiding officer's action, findings, or conclusion is contrary to the weight of the evidence currently of record.

§404.950 Decision by Appeals Council or remanding of case.

(a) Case remanded to presiding officer. The Appeals Council may remand to the presiding officer for rehearing, receipt of evidence, and decision, any case which it decides to review

(c) Decision on review. The Appeals Council will issue a decision affirming, modifying, or reversing the hearing decision or issue an order to vacate such decision and remand the case to a presiding officer for rehearing and decision. A decision of the Appeals Council shall be based upon the evidence received into the hearing record and such further evidence as the Appeals Council may receive.

Section 404.947a (a) sets out grounds for the Appeals Council's (AC) exercise of its discretionary reviewing function that are within the usual scope of administrative or judicial review. Under these provisions the Appeals Council corrects errors of law and establishes precedent. Section 404.947a (b), however, permits de novo review on the submission of new evidence. There is no persuasive basis for this provision. If the claimant has new and material evidence, he should be permitted to petition to reopen the hearing. The decision whether to reopen the case and how it is affected by the new evidence could then be rendered by the person most familiar with the case, the ALJ. The current provision simply gives the claimant, who can scrape up some new evidence, the possibility of yet another level of de novo review. To that degree it undermines the integrity of the hearing process. In addition, the "open file" concept undermines the precedential effect of the Appeals Council decisions.

Because of the ambiguity of the Appeals Council's position it may often be unclear whether remand or reversal signals a disagreement with a particular judgment, perhaps on a reevaluation or collection of new facts, having little significance for subsequent cases and modes of operation, or is a determination that the "error" of the ALJ requires modification to his behavior in all subsequent cases. In order to clarify this situation the Appeals Council should, save in exceptional circumstances, limit itself to the correction of errors of law and, in that effort, to the enunciation of principals to guide subsequent cases.

2. SSA should devote more attention to the development and dissemination of precedent materials. These actions should include: (a) Regulatory codification of settled or established policies; (b) Reasoned acquiescence or non-acquiescence in judicial decision; (c) Publication of fact-based precedent decisions; (d) Periodic conferences of ALJs for discussion of new legal developments or recurrent problems.

Although every prior study of the BHA hearing system has made a more or less strident call for increased development of precedent, BHA or SSA have not responded. In part it seems that this lack of responsiveness results from a considered and reasonable judgment that there is not much that can be done to explicate the application of the disability standard beyond the existing regulations and manual issuances, unless the administration is prepared to abandon individualized hearings and issue more absolute, objective and therefore in many cases arbitrary, rules on qualification for disability benefits. Although there is much good sense to this position, it seems that BHA or SSA could usefully do somewhat more than it is currently doing to develop and disseminate precedent materials.

(a) First of all, because, as was previously noted, administrative law judges sometimes are resistant to the effectuation of policies not set forth in regulations, BHA would do well to codify its settled or established policies by regulation rather than simply in the BHA manual. Some important policies, for example, the policies on the use of vocational experts in hearing and on the evaluation of evidence involving pain, now appear only in the manual, or in circulars amending the manual, rather than in regulatory

forms. The proposed "grid regulations", discussed above, are, of course, a move in this direction.

(b) The current practice of BHA seems to be largely to ignore the precedential effect of court decisions. Although there is a "circular" to administrative law judges that encourages them to follow the procedural and evidentiary requirements of the courts in their jurisdiction,³⁷ very little is done to make administrative law judges aware of the precedents either in their own jurisdictions or in others. The Appeals Council by-and-large does not reverse or remand administrative law judge decisions on grounds of their non-conformity with existing judicial precedents. Nor are judicial precedents specifically picked up or discussed, when not acquiesced in the "Social Security Rulings."

It is not here suggested that the Social Security Administration should attempt to adhere to every judicial precedent. There is certainly something to the notion that SSA has a national responsibility, whereas the district and circuit courts operate only regionally. National acquiescence in the decisions of one district or appeals court is certainly not a clear implication of making judicial review available to dissatisfied claimants, and in any event acquiescence would quite often conflict with the rulings in another district or circuit. Nor is it clear that SSA should acquiesce in judicial precedent, even within the district or circuit where it occurs, when national disuniformity would thereby be created.

The point here, rather, is that BHA and SSA are not making use of the focused and legally relevant feedback on the agency's policies and decisions that judicial precedent makes available. Instead of confronting the policy issues that judicial precedents present squarely, by either appealing the cases or acquiescing in them, BHA and SSA tend to treat judicial precedent with "benign neglect". It would seem highly instructive for the administrative law judge corps, and perhaps helpful in eliminating some of the variance in administrative law judge decisions, if BHA would adopt a policy of acquiescing or not acquiescing in judicial precedent, at least at the appeals court level, and publishing in the Social Security Rulings its reasoned agreement or disagreement with such judicial decisions.

Of course every case will not provide an appropriate occasion for acquiescence or non-acquiescence in a reasoned decision. And it seems impossible to specify in the abstract when the appropriate occasions would be, other than in language which might track the vague criteria of the Supreme Court's exercise of certiorari jurisdiction. There nevertheless might be a significant difference between the current silent or obscured dialogue between the Office of General Council and the federal courts and a more open dialogue which involved the policy branches of SSA and was made available to the ALJ corps. Not only might ALJ performance be improved but also judicial pique at being ignored would be ameliorated.

(c) Closely connected to the use of judicial precedent is the notion that

37. Interim Circular #62 (Mar., 1976).

the precedents of the Appeals Council and even occasional administrative law judge decisions might be usefully communicated to the administrative law judge corps. Here, as in the case of judicial precedents, it would seem that when there are inconsistent decisions involving similar issues SSA has a responsibility to develop and publicize consistent national policy. The Bureau of Hearings and Appeals is critically placed, through its Appeals Council, to aid in this process by identifying problem areas and suggesting solutions. In carrying out this function it would seem that the use of case-based precedent is particularly appropriate. The problems of judgment and therefore disagreement amongst ALJs lie in applying the necessarily general disability standard to complex fact situations. A sense of how that judgment should be exercised can often not be communicated effectively in abstract terms. Concrete examples rather than general rules are what is wanted. Yet in the regulations, the manual and in the Social Security Rulings one looks in vain for the publication of examples or decisions that bear on the run-of-mine judgments that ALJs must make in disability cases, rather than arcane points of law that rarely arise.

It may be, of course, that fact-based precedents, given the usual forms of argument about the applicability of caselaw to subsequently arising facts, will have little effect on ALJ variance. On the other hand if the Appeals Council remands lots of cases directly to ALJs, and it does, and this is thought to be instructive, perhaps at least some of these instructions should be made available to a broader audience of ALJs and disability practitioners through general publication.

(d) Finally, although the initial training sessions for administrative law judges seem to be well structured and effective, there is virtually no follow-up in the form of conferences or refresher courses beyond the first year of an ALJ's career. The value of conferences or seminars for the transmission of professional information may of course be questioned. But it seems at least peculiar that administrative law judges, almost alone among professionals, have virtually no courses or seminars offered to them for the upgrading or maintenance of their professional skills or knowledge.

3. *BHA should continue an aggressive quality assurance program to identify errors, determine their causes, and prevent their recurrence.*

The Quality Assurance program conducted by the BHA Appraisal Staff utilizes data generated by three types of internal quality review to formulate generalizations concerning the incidence of various types of errors in the system and to develop cost-effective methods for correcting those errors. Each of the three methods of quality review also have their own feedback mechanisms through which conclusions drawn in the process of evaluating the decisions are communicated to the ALJs either through the promulgation of general regulations or other directives or by direct contact with the ALJ concerned.

The three types of quality review are: 1) A quality review by the Appraisal Section. This review includes two operations: (a) Analysis of a sample of cases on the basis of data supplied by Appeals Council Analysts. (In

instances where error is detected by an analyst, the error is confirmed, with respect to appealed denials, by the Appeals Council member actually responsible for the case and with respect to ALJ reversals and grants, by an Appeals Council member designated by the Director of BHA); (b) A series of special studies conducted by the Appraisal Staff of such phenomena as remand at various levels, the usage of VE's and medical advisors and the correlation of error with ALJ output or reversal rates; 2) A regional Chiefs' Peer Review Program focusing on the decisions of new ALJs, all affirmations and a 20% sample of reversals by low producing ALJs, cases involving allegations of unfair hearing and reversal decisions and remands (without review of the file). A Program Operations Officer at the regional headquarters is responsible for this review, under the supervision of the Regional Chief Administrative Law Judge and with the assistance of analysts assigned to the regional headquarters; and 3) An Appeals Council Peer Review System conducted by each Appeals Council member for the geographic area for which he is responsible. This review is conducted only with respect to appealed cases. Files are maintained on each hearing office to detect recurring problems. Material consists of Appeals Council remands or decisions, ALJ decisions and memoranda in remanded cases and the memoranda of Appeals Council analysts concerning cases that are remanded.

The Quality Assurance program has been in existence for only one year. Moreover, certain aspects of it, most notably the quality review of the grants by the ALJ and the Regional Chiefs' Peer Review Program have just recently reached the point where they are producing the contemplated data.

Nevertheless it seems plain that the Quality Assurance Program should be continued. Because the caseload of the BHA system is so great it is clearly not feasible to review all or substantially all of the cases decided by administrative law judges. Moreover none of the cases that are granted by administrative law judges are subject to an Appeals Council or judicial review. If persistent problems are to be detected and corrected only a Quality Assurance Program holds out the prospect for success in that endeavor. The Administrative Conference is on record as, in general, favoring the use of quality assurance techniques in benefit programs involving a large number of adjudicative decisions.³⁸

The only possible objection to the use of Quality Assurance is its effect in the "independence" of administrative law judges. And it is certainly clear the ALJs are concerned about the surveillance by the Appeals Council and the appraisal staff. They complain bitterly about the statistical information compiled concerning ALJ production and reversal rates and they are particularly unhappy about the use of those statistics as a basis for review of cases.

38. ACUS Recommendation No. 73-3, Quality Assurance Systems in the Adjudication of Claims to Compensation or Benefits, 1 CFR §305. 73-3.

Although some ALJs seem to believe that focusing the quality assurance effort on statistically aberrational behavior interferes with their independence by inducing them to conform to statistically prevailing practices, this complaint should not be credited. BHA management must gather information concerning the functioning of the system in order to improve it. In that effort it must of necessity detect and analyze unusual behavior. Moreover, extreme cases of deviance may appropriately indicate the need for intensive investigation to determine whether the administrative law judge should be removed for cause.

d. Judicial Review

When seeking a "Secretary-initiated" remand, pursuant to Section 205 of the Social Security Act, the Secretary should state the reasons for such request.

The most distinctive feature of judicial review in the disability area is the high proportion of cases that result in a remand for further administrative proceedings. To understand this phenomenon we must begin by looking at the unique provisions for remand in §205(g) of the Social Security Act. The relevant language is as follows:

The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . . The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may at any time, on good cause shown, order additional evidence to be taken before the Secretary.

The first sentence is standard; it gives the court discretion to remand in cases where the Secretary's decision is found to be unsupported by "substantial evidence" or where some legal error, substantive or procedural, has been committed.

It is the third sentence, however, which distinguishes this review statute from all others. The first clause gives the Secretary an unqualified privilege, even without a showing of cause, to retract any decision he is not prepared to defend on the record, so long as he does so before filing an answer. The Secretary exercises this privilege in one out of every eight disability cases filed, and in so doing accounts for more than 40% of all remands.

The question inevitably arises why the Secretary in one case out of every eight, finds it necessary to recall from court the "lemons" that passed his inspection only weeks earlier. The "Secretary" in this context is, after all, the same Appeals Council which affirmed the ALJ decision at the administrative-review level. Indeed, the same individual usually makes, or helps make, both decisions. Yet the percentage of cases in which the Council declines to defend ALJ decisions in court actually exceeds the percentage

in which it disapproves ALJ decisions at the review level. Something seems amiss in a system which gives the claimant a better chance of favorable action, from a given decision-maker on a given record, upon reconsideration than upon original consideration.³⁹

There are several possible explanations for the numerous mind-changes. In certain cases, the court complaint itself may identify previously unnoticed deficiencies in the ALJ decision although the extreme generality of most complaints makes this a rarity. More often the Council receives additional information about a case in the interim between its decision and the court filing. And more basically, one suspects that when given 6,000 court filings as opposed to 35,000 requests for review at the administrative level, the Council may be using systematically different criteria in evaluating cases at the administrative-review and court-remand stages, respectively.⁴⁰

The decision whether to grant or deny a request for administrative review hinges primarily on a practical judgment as to whether the claimant has proven, or upon remand would be likely to prove, his entitlement to benefits.⁴¹ An ALJ's omission of necessary findings, failure to provide an adequate rationale or neglect of relevant evidence is not ordinarily ground for remand or reversal by the Council, if the Council member is satisfied that the claimant is not entitled to benefits, that the errors below were harmless, and that a remand would not change the outcome.

The filing of a disability action in court sets the stage for a second round of review by the Appeals Council, this time under circumstances that

39. Of course, if one assumes, in Darwinian fashion, that the claims taken to court are the strongest subset of all administratively rejected claims, it is not, perhaps, extraordinary, that a few hundred cases a year — about 2% of all those reviewed by the Council in the first instance — should be decided differently from one viewing to the next. But to the extent one assumes instead that the court cases are more or less representative of the total administrative caseload, the frequency of Secretary-initiated remands becomes more troubling.

40. The relevant provisions of the BHA Handbook give no indication of such a double standard. On the contrary, the stated grounds on which the Council will move for a judicial remand are, if anything, more limited than those it uses in granting claimants' requests for administrative review. According to the Handbook, court remands are requested when it appears that the claim can be allowed on the record as it stands, that further documentation would justify a favorable decision, or that the record is deficient in "Kerner type" vocational evidence. Remands are not ordinarily requested "solely for the purpose of documenting a denial" — solely, for example, to improve upon the ALJ's opinion by supplying needed findings or explanations or correcting errors of law that do not seem likely to affect the outcome. No such limitation is mentioned among the criteria for granting Appeals Council review on the grounds, among others, that the ALJ's action is unsupported by substantial evidence or that there has been an error of law, including failure to make essential findings.

Thus, one might conclude from a comparison of the two sets of criteria that an errant ALJ decision is, if anything, more likely headed off at the first pass than at the second. Indeed, if it were not for the "documenting a denial" constraint, the number of Secretary-initiated remands would be vastly greater than it now is.

41. In addition, review may be granted if the ALJ has made some blatant error of law or has failed to produce vocational evidence to satisfy the Secretary's burden of proof (though one Council member indicated that even then he would grant review only if claimant's attorney specifically referred to the error).

make immediate and palpable the in terrorem effect of judicial oversight. In this context remand for "technical" error may appear a wise exercise of discretion.

The main trouble with this procedure is that giving the Council member a chance to retrieve his mistake at the threshold of litigation may reduce his incentive to avoid the mistake in the first instance. If so, the great majority of claimants — those who do not go to court — are worse off by virtue of the Secretary's automatic remand privilege than they would be without it — worse off, conceivably, than if there were no judicial review at all. In the latter case the Council, aware of being the claimant's last resort, might approach the task of administrative review in a more sympathetic, a more protective, spirit than it now does.

Furthermore, even for the minority of claimants who do go to court, the Secretary's automatic recall privilege is not an unmixed blessing. It is, to be sure, an efficient procedural device in those cases destined to result in remand anyway. In that numerous class of cases, it cuts short the judicial proceeding and saves all concerned the wasted motion of answer, briefing, oral argument, and adjudication. There are other cases, however, in which, but for the Secretary's intervention, the claimant might be able to obtain from the district court a reversal without remand. In such cases the Secretary's remand puts the claimant through another round of administrative, and perhaps judicial, proceedings in order to get the relief the court would have given him on the original administrative record.

In sum, the Secretary's automatic remand privilege is open to objection on two grounds: first, that it weakens the disciplinary effect of judicial review on Appeals Council decisionmaking at the administrative review level, to the unwarranted disadvantage of the six out of seven claimants who do not litigate; and, second, it denies to some litigating claimants the opportunity to secure an outright reversal on the original administrative record. For both reasons, Congress might consider the advisability of conditioning the Secretary's remand privilege upon the absence of objection by the claimant. Where objection is made, the Secretary could be given the opportunity to show good cause for the remand. Such a requirement would not, of course, prevent the Secretary from conceding disability and allowing benefits if he believed the record so warranted.

As an interim measure, which should generate some data on the actual use of Secretary-initiated remands and which would give the claimant information concerning the progress of his claim, we propose that the Secretary at best state the reasons for seeking a remand. A proposal for legislative action would await analysis of the bases put forward in remand cases.

e. Representation

1. *BHA offices should fully inform claimants prior to the hearing of the availability of counsel and lay representation and of the means by which they may obtain counsel or representation in their local area on a fee or no-fee basis.*

It seems clear that many claimants who would desire to have counsel or representation, and who with better information could procure it, are not represented. This situation results from several converging factors.

First, the notice that BHA sends out concerning counsel is simply a general pamphlet which contains no details on the availability of counsel or other representation in the area where the claimant resides. Hence while it may be effective in notifying claimants of their right to have counsel it gives them no information on how that right can be exercised effectively.

Second, it seems that the only mention of counsel outside of the general pamphlet is in the beginning of BHA hearings. At that time the administrative law judge asks unrepresented claimants whether they understand that they have a right to be represented by counsel and are prepared to go forward with the hearing without counsel. Since most claimants have waited a number of months to have their appeals heard, there is a significant disincentive for them to delay the hearing to get counsel after their hearing has finally come up.

Third, even when a claimant at the hearing says that he or she does not want to go forward without counsel, some administrative law judges are quite reluctant to give the claimant any assistance in the procurement of counsel or information concerning where counsel or other representation is available on either a fee paying or non-fee paying basis.

There seems no persuasive reason not to fully inform the claimants, at a time when they exercise judgment unimpaired by the potential loss of their hearing date, concerning the availability of representation in their local area and the way in which fees are paid or assistance can be secured on a no-fee basis. Each BHA office could quite easily construct an information flier to be included in its hearing notices and sent to all claimants along with those notices. Such an information flier should fully explain the claimants' right either to legal or non-legal representation, how legal representation may be obtained through a local lawyer referral service or legal aid society and should identify any groups in the community who provide lay representation in disability hearings. It should also be made clear that lawyers often take disability cases on a contingency basis. Many claimants who forego counsel because they "cannot afford it" do so with no knowledge of the existence of either legal aid societies or contingent fee structures.

2. BHA should assist and cooperate with appropriate organizations in the development of training programs for attorneys and lay representatives.

Although there are rarely significant legal issues in disability claims, there are clearly better and worse ways of going about the development of evidence and the production of that evidence at hearings. There is presently no easy way for attorneys or lay representatives to expose themselves to a sufficient number of hearings or to have discussions with knowledgeable BHA personnel in order to learn the "tricks of the trade". After observing perhaps 50 hearings and interviewing 30 ALJs, a member of the Center study team could probably provide effective representation for a disability

claimant. It might take years for the practitioner to get a similar exposure. Hence it seems sensible to us for BHA to consider establishing training programs for attorneys and lay representatives. It seems clearly in BHA's interest to do so. A knowledgeable corps of attorneys and lay representatives would not only better inform the hearing process, both in the hearing and by development of relevant evidence prior to the hearing, but they should also exercise an appropriate screening function with respect to appeals that are brought to them for assistance.