



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

# Achieving Greater Consistency and Accuracy in Social Security Disability Adjudications

## Committee on Adjudication

### Proposed Recommendation for Council | May 8, 2013

1           The Administrative Conference of the United States has undertaken many studies over  
2 the years relating to the Social Security disability benefits system.<sup>1</sup> It has issued a number of  
3 recommendations specifically directed at improving SSA’s initial application and appeals  
4 processes,<sup>2</sup> as well as other recommendations more generally designed to improve agency  
5 adjudicatory procedures.<sup>3</sup> The Conference last issued a recommendation on the Social Security  
6 disability benefits system over twenty years ago. The system has grown substantially since that  
7 time. Approximately 3.3 million disability claims are now filed at the state level annually,<sup>4</sup>

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<sup>1</sup> The Social Security Act created two programs—Social Security Disability Insurance and Supplemental Security Income—to provide monetary benefits to persons with disabilities who satisfy these programs’ respective requirements. See 42 U.S.C. §§ 401(b), 1381 (2013).

<sup>2</sup> These recommendations include: Recommendation 91-3, *The Social Security Representative Payee Program*, 56 Fed. Reg. 33,847 (July 24, 1991); Recommendation 90-4, *Social Security Disability Program Appeals Process: Supplementary Recommendation*, 55 Fed. Reg. 34,213 (Aug. 22, 1990); Recommendation 89-10, *Improved Use of Medical Personnel in Social Security Disability*, 55 Fed. Reg. 1665 (Jan. 18, 1990 (as amended)); Recommendation 87-7, *A New Role of the Social Security Appeals Council*, 52 Fed. Reg. 49,143 (Dec. 30, 1987) [hereinafter ACUS Recommendation 87-7]; and Recommendation 78-2, *Procedures for Determining Social Security Disability Claims*, 43 Fed. Reg. 27,508 (June 26, 1978).

<sup>3</sup> E.g., Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48,789 (Aug. 9, 2011); Recommendation 89-8, *Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions*, 54 Fed. Reg. 53,495 (Dec. 29, 1989); Recommendation 86-7, *Case Management as a Tool for Improving Agency Adjudication*, 51 Fed. Reg. 46,989 (Dec. 30, 1986); Recommendation 73-3, *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*, 38 Fed. Reg. 16,840 (June 27, 1973).

<sup>4</sup> SOC. SEC. ADMIN., ANNUAL PERFORMANCE PLAN FOR FY 2013 AND REVISED PERFORMANCE PLAN FOR FY 2012, at 11 (2012).

8 which represents a 57% increase since 1990.<sup>5</sup> In a program of this size, adjudicating disability  
9 benefits claims in a fair, consistent, and timely manner is a monumental challenge.

10 Those cases flow through a nationwide, multi-step process, by which SSA determines  
11 whether a claimant is disabled and eligible for benefits. State agencies make initial disability  
12 determinations using federal guidelines. Claimants may file (and pursue) their own claims or  
13 they may choose to enlist the assistance of a representative, who may or may not be a lawyer.  
14 If benefits are denied, claimants may request reconsideration (in most states). If benefits are  
15 denied after reconsideration, claimants may request a hearing before an Administrative Law  
16 Judge (ALJ). ALJs adjudicate nearly 800,000 cases a year.<sup>6</sup> In FY 2011, about 56% of disability  
17 benefits claims were allowed at the ALJ hearing stage,<sup>7</sup> though more recent figures show a  
18 decline in this rate.<sup>8</sup> ALJ hearings, which may be in-person or by video conferencing, are  
19 conducted using a de novo standard of review, and generally follow the Administrative  
20 Procedure Act's adjudication procedures. Although ALJs preside at the hearings,  
21 decisionwriters typically write decisions for ALJs based on instructions from them. Usually,  
22 decisionwriters are not assigned to specific ALJs, but serve instead as part of a "pool" in each  
23 hearing office from which writing assignments for decisions are made.

24 Appeals Council review is the final step in the administrative process. The Appeals  
25 Council is comprised of about 125 Administrative Appeals Judges and Appeals Officers, and has  
26 discretionary authority to grant, deny, or dismiss a claimant's request for review, as well as  
27 remand the case back to an ALJ or issue a decision.<sup>9</sup> In FY 2012, the Appeals Council processed

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<sup>5</sup> SOC. SEC. ADVISORY BD., ASPECTS OF DISABILITY DECISION MAKING: DATA AND MATERIALS 6 tbls. 1a & 1b (Feb. 2012).

<sup>6</sup> *Id.* at 13.

<sup>7</sup> HAROLD KRENT & SCOTT MORRIS, STATISTICAL APPENDIX: ANALYSIS OF ADMINISTRATIVE LAW JUDGE DISPOSITION AND FAVORABLE RATES IN FISCAL YEARS 2009 TO 2011 13, 14 tbl. A-8 (2013) [hereinafter STATISTICAL APPENDIX].

<sup>8</sup> HAROLD KRENT & SCOTT MORRIS, ACHIEVING GREATER CONSISTENCY IN SOCIAL SECURITY DISABILITY: AN EMPIRICAL STUDY AND SUGGESTED REFORMS 8 (2013) (noting a 50% allowance rate in FY 2012).

<sup>9</sup> The Conference believes that its 1987 conclusion, that a "principal mandate" of the Appeals Council is "to recommend and, where appropriate, develop and implement adjudicatory principles and decisional standards for the disability determination process" remains valid today. See ACUS Recommendation 87-7, *supra* note 2.

28 over 166,000 requests for review, a 30.7% increase from FY 2011.<sup>10</sup> In addition to processing  
29 requests for review, the Appeals Council has authority to identify cases for review on its “own  
30 motion” through use of “random or selective sampling” techniques.<sup>11</sup> Currently, however, the  
31 Appeals Council only reviews a national random sample of ALJ decisions as a quality assurance  
32 mechanism; the Appeals Council has not exercised its selective sampling authority in recent  
33 years.<sup>12</sup> In FY 2012, the Appeals Council completed random review of 7,074 such decisions.<sup>13</sup>  
34 The Appeals Council publishes its decisions only rarely, in the form of Appeals Council  
35 Interpretations (ACIs), and its decisions sometimes serve as the basis for Social Security Rulings.  
36 Claimants who disagree with the final administrative decision may seek judicial review in  
37 federal court.

38 Adjudicators and other agency employees at both the ALJ hearing level and Appeals  
39 Council level use electronic case management systems to help manage their workflow and to  
40 provide case-related management information. The current system in use at the hearing level  
41 is the Case Processing Management System (CPMS), while the Appeals Council level uses the  
42 Appeals Council Review Processing System (ARPS). Not only do adjudicators and other staff use

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<sup>10</sup> Soc. Sec. Admin., Office of Appellate Operations, Executive Director’s Broadcast, at 1 (Oct. 19, 2012) [hereinafter Exec. Dir. Broadcast]. Of these 166,000 requests for review, the Appeals Council dismissed or denied 78.3% of the requests, remanded 18.6% of the cases back to ALJs, and issued decisions (*i.e.*, fully favorable, partially favorable, or unfavorable) in 2.6% of the cases. *Id.* at 2.

<sup>11</sup> 20 C.F.R. §§ 404.969, 416.1469 (2013) (detailing the Appeals Council’s “own motion” review authority and procedures). The Social Security Act grants broad authority to the Commissioner to establish hearing procedures and, on his or her own motion, hold hearings or conduct other proceedings as necessary for the proper administration of the program. *See, e.g.*, 42 U.S.C. §§ 405(b)(1), 1383(c)(1)(A) (2013).

<sup>12</sup> This recommendation suggests that, to enhance decisional accuracy and consistency, SSA expand the Appeals Council’s use of “own motion” review of unappealed ALJ decisions through selective sampling based on announced, neutral, and objective criteria that identify problematic issues, fact patterns, or case characteristics. Under this recommendation, focused review might be warranted, for example, based on: the subject matter of a claim, the manner in which a hearing was held, or statistical analyses showing a high likelihood of error or significantly anomalous outcomes.

<sup>13</sup> Exec. Dir. Broadcast, *supra* note 10, at 3. The Appeals Council agreed with the decisions of ALJs 82.5% of the time, and either remanded or issued corrective decisions approximately 16% of the time. At the end of the FY 2012, there were 741 “own motion” review cases still pending final action. *Id.*

43 CPMS and ARPS in their day-to-day work, but the agency also uses data from these systems to  
44 identify and address trends and anomalies existing at the various levels of agency adjudication.  
45 While SSA has endeavored to build effective data reporting systems, limitations still exist that  
46 relate to data capture and linking the various systems.

47 Not only does SSA process an extraordinary number of claims through a national, multi-  
48 tiered system, but, in doing so, the agency tries to ensure that decisionmaking is consistent and  
49 accurate at all levels of adjudication, and that legally sufficient decisions are issued that can  
50 withstand review by federal courts. Consistency and accuracy, however, have suffered under  
51 the strain of administering such a sprawling program. To be sure, an ALJ faces an enormous  
52 task in adjudicating hundreds of cases annually.<sup>14</sup> Nonetheless, divergent allowance rates  
53 among ALJs suggest that claims are being resolved in an inconsistent, if not inaccurate,  
54 manner.<sup>15</sup> The Appeals Council similarly struggles to fulfill its error-correction and quality-  
55 review roles. That these steps may have room for improvement is evidenced by the 45% rate at  
56 which cases are remanded back to the agency from federal courts in recent years.<sup>16</sup> Bringing  
57 greater consistency and accuracy to the disability claims adjudication process will enhance the  
58 fairness and integrity of the program.

59 One area of particular concern—due to its apparent contribution to a high remand  
60 rate—is SSA’s treating source rule, which generally affords “controlling weight” to the opinions  
61 of a claimant’s treating physician, psychologist,<sup>17</sup> or other acceptable medical source.<sup>17</sup> In the

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<sup>14</sup> On average, for FY 2009 – FY 2011, ALJs issued 538.9 dispositions per year. See STATISTICAL APPENDIX, *supra* note 7, at 6, 8 tbl. A-2.

<sup>15</sup> In recent years, while the distribution of yearly allowance disposition rates has been approximately normal (*i.e.*, a mean of 56%), the distribution covers a wide range of allowance rates, with 95% of the rates falling between 26% and 85%. See STATISTICAL APPENDIX, *supra* note 7, at 13, 14 fig. A-8 (analyzing allowance rates for FY 2009 – FY 2011). The lowest allowance rate was 4% and the highest allowance rate was 98%. *Id.*

<sup>16</sup> STATISTICAL APPENDIX, *supra* note 7, at 54 tbl. A-24. Policy compliance among ALJs has improved in recent years. See Michael J. Astrue, former Comm’r, Soc. Sec. Admin., Address at the Social Security Advisory Board Forum: Straight Talk about “Disability Reform.” (Mar. 8, 2013), *available at* <http://www.ssab.gov/Portals/0/2013Forum/Presentations/Astrue%20Speech%203-8-13.pdf>.

<sup>17</sup> See 20 C.F.R. §§ 404.1527(c), 416.927(c) (2012).

62 early 1990s, SSA sought to bring greater clarity and uniformity to the assessment of medical  
63 evidence by establishing regulatory standards for such evaluations. In practice, however, this  
64 evidentiary rule has not delivered on its promise of improving consistency. In recent years,  
65 erroneous application of the treating source rule has been cited as the basis for remand by the  
66 Appeals Council at a 10% frequency rate, and the frequency rate with which it is cited by  
67 federal courts is even higher at 35%.<sup>18</sup> Dramatic changes in the American health care system  
68 over the past twenty years also call into question the ongoing efficacy of the special deference  
69 afforded to the opinions of treating sources. Individuals typically visit multiple medical  
70 professionals in a variety of settings for their health care needs and less frequently develop a  
71 sustained relationship with one physician.<sup>19</sup> Moreover, difficulty in determining who among a  
72 wide range of medical professionals should be considered a treating source has bedeviled ALJs  
73 and reviewing courts, contributing to high remand rates.<sup>20</sup>

74 This recommendation finds its genesis in SSA's request that the Conference study the  
75 role of the Appeals Council in reviewing cases to reduce any observed variances among  
76 adjudicative decisions at the hearing level, as well as the efficacy of SSA's treating source rule.  
77 These studies also revealed other areas that appear ripe for recommendation. While SSA has  
78 enacted various initiatives to increase consistency and has issued rulings to clarify its  
79 regulations, the size and complexity of the system leave more work to be done. The following  
80 recommendations reaffirm certain portions of past recommendations that remain valid and  
81 relevant and also identify new approaches to ensure consistency, accuracy, and fairness across  
82 this massive decision system.

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<sup>18</sup> See OFFICE OF THE CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SSA DISABILITY BENEFITS PROGRAMS: ASSESSING THE EFFICACY OF THE TREATING PHYSICIAN RULE, Appendix B, at A-4, A-8 (2013).

<sup>19</sup> See *id.* at 25-33.

<sup>20</sup> See *id.* at 23-24, 33-35.

## RECOMMENDATION

### 83 ALJ Hearing Stage

84 1. *Improving Adjudication Effectiveness and Consistency.* In order to promote  
85 greater decisional consistency, and streamline the adjudication process at the ALJ hearing  
86 stage, SSA should consider:

87 (a) requiring claimant representatives (while also permitting claimants without  
88 representation) to submit pre-hearing briefs in a standardized format that, among other  
89 things, summarizes the medical evidence and justification for the claimant's eligibility  
90 for benefits;

91 (b) expanding the use of video hearings in a manner consistent with sound  
92 technological practices, because such hearings promote efficiency and do not lead to a  
93 significant difference in allowance rates from in-person hearings. SSA should continue  
94 to advise claimants that opting for video hearings often results in faster scheduling of  
95 hearings (as compared to in-person hearings) and more convenient hearing locations;  
96 and

97 (c) exploring the assignment of decisionwriters and case technicians to specific ALJs  
98 in a hearing office (with Hearing Office Directors continuing to supervise such support  
99 staff), while maintaining flexibility for changes in technological and operational needs.

### 100 Appeals Council

101 2. *Balancing Error-Correction and Systemic Review Functions.* SSA should continue  
102 to promote the consistent application of policy to the adjudication of disability benefits claims  
103 across a nationwide program. SSA should ensure that the Appeals Council strikes an  
104 appropriate balance between its error-correction function when exercising discretionary review  
105 of individual claimants' requests for review, and its mandate to improve organizational  
106 effectiveness, decisional consistency, and communication of agency policy through use of "own  
107 motion" review and other types of systemic quality assurance measures.

108           3.     *Enhancing Communication.* SSA should make clear that an essential function of  
109 the Appeals Council is both to focus on consistent application of Social Security regulations and  
110 policies on a systemic basis, and to disseminate advice and guidance to SSA policymakers, ALJs,  
111 and other lower-level decisionmakers. The Appeals Council should advise and assist  
112 policymakers and ALJs by:

113           (a)     issuing Appeals Council Interpretations (ACIs), with greater frequency, in order  
114 to: address policy gaps; promote greater consistency and uniformity throughout the  
115 adjudicatory process; and, establish precedents upon which claimants and their  
116 representatives may rely. Such ACIs should be circulated within the agency and made  
117 publicly available through posting on SSA’s website or other similar means of public  
118 dissemination;

119           (b)     considering the publication of selected ALJ or Appeals Council decisions to serve  
120 as model decisions (*e.g.*, they are well-reasoned and clear), or to provide needed policy  
121 clarifications. Consistent with statutory obligations to maintain the privacy of sensitive  
122 information, such publications should not include personally identifiable information;

123           (c)     continuing, to the greatest extent feasible, to send cases that have been  
124 remanded from the Appeals Council or federal courts back to the same ALJs who initially  
125 adjudicated such claims for additional proceedings as required. If an ALJ who initially  
126 decided a claim will not be presiding over a case post-remand, SSA should nonetheless  
127 ensure that he or she still receives notification of the remand decision. Decisionwriters  
128 who were involved in drafting a remanded decision should also receive notification of  
129 remand decisions; and

130           (d)     developing a program for ALJs to serve extended voluntary details on the  
131 Appeals Council in order to introduce a measure of peer review, enrich ALJ  
132 understanding of the appeals process, and benefit the Appeals Council by introducing  
133 the perspectives and insights of ALJs. In support of that effort, SSA should seek a waiver  
134 from the Office of Personnel Management (OPM) of its durational (120-day) limit on

135 details, which, if granted, would enable detailed ALJs to gain a deeper knowledge of the  
136 Appeals Council than is possible under a shorter detail period. OPM should give  
137 favorable consideration to such a request.

138 4. *Expanding Focused "Own Motion" Review.* In order to focus attention on the  
139 unappealed decisions that most warrant review, thereby enhancing both accuracy and  
140 consistency, SSA should expand the Appeals Council's use of its "own motion" review by using  
141 selective review in a manner consistent with ALJ decisional independence. The Appeals Council  
142 should use announced, neutral, and objective criteria, including statistical assessments, to  
143 identify problematic issues or fact patterns that increase the likelihood of error and, thereby,  
144 warrant focused review. In addition, SSA should review unappealed decisions that raise issues  
145 whose resolution likely would provide guidance to ALJs and adjudicators. In expanding its "own  
146 motion" review, SSA must ensure that (i) selection-of-review criteria are developed in a neutral  
147 fashion without targeting particular ALJs or other decisionmakers, and that (ii) inclusion of  
148 cases in such review does not serve as the basis for evaluation or discipline. Thus, if necessary,  
149 SSA should revise its regulations through notice-and-comment rulemaking to clarify and expand  
150 the Appeals Council's use of selective sampling to identify for review decisions that:

151 (a) raise issues for which resolution by the Appeals Council would provide policy  
152 clarifications to agency adjudicators or the public;

153 (b) appear, based on statistical or predictive analysis of case characteristics, to have  
154 a likelihood of error or lack of policy compliance; or

155 (c) otherwise raise challenging issues of fact or law, or have case characteristics,  
156 that increase the likelihood of error.

#### 157 **Use of Opinion Evidence from Medical Professionals (Treating Source Rule)**

158 5. SSA should revise its regulations to eliminate the controlling weight aspect of the  
159 treating source rule in favor of a more flexible approach based on specific regulatory factors.  
160 SSA should give ALJs greater discretion and flexibility when determining the appropriate weight  
161 to afford opinions from treating sources (which may or may not be determinative), consistent

162 with the factors enumerated in the current regulatory scheme for evaluation of opinions of  
163 acceptable medical sources who are not deemed “treating” sources. Such factors should  
164 include: (i) length of the treatment relationship and frequency of examination; (ii) nature and  
165 extent of the treatment relationship; (iii) supportability of the medical source’s opinion; (iv)  
166 consistency of the medical source’s opinion; (v) specialization of the medical source; and (vi)  
167 any other factors that may support or contradict a medical source’s opinion. In all cases, ALJs  
168 should articulate the bases for the weight given to opinions from medical sources.

169 6. SSA’s existing regulatory scheme, which assigns second-tier evidentiary value to  
170 the opinions of nurse practitioners (NPs), physician assistants (PAs), and licensed clinical social  
171 workers (LCSWs) professionals because they are not considered “acceptable medical sources,”  
172 should be reconsidered to reflect the realities of the current health care system. For many  
173 Social Security disability claimants, these medical professionals are the de facto “treating  
174 source” of medical care for physical and mental illnesses. SSA should consider:

175 (a) revising its regulations to add NPs, PAs, and LCSWs as “acceptable medical  
176 sources,” consistent with their respective state-law based licensure and scopes of  
177 practice; or

178 (b) issuing a new Social Security ruling or other interpretive policy statement that  
179 makes clear, for agency adjudicators, federal courts, and the public, the value of, as well  
180 as the weight to be afforded, the opinions of these three types of medical professionals.

## 181 **Statistical Quality Assurance Measures**

182 7. SSA should consider enhancing its current data reporting systems in order to  
183 enable a more robust statistical quality assurance program. To enhance its current data  
184 reporting systems, such as the Case Processing Management System (CPMS) and the Appeals  
185 Council Review Processing System (ARPS), or any respective follow-on systems, SSA should  
186 consider how to associate types of cases and issues, regions, hearing offices, adjudicators,  
187 procedural elements and benchmarks, and decisional outcomes together. The goal of such

188 systems should not only be objective evaluation of the agency's case processing operation, but  
189 also the effective utilization of data to inform policy formation and operational consistency.

190 8. SSA should specifically consider addressing the limitations of CPMS, ARPS, and  
191 any respective follow-on systems by ensuring that these data reporting systems capture (as  
192 appropriate):

193 (a) information related to any prior hearings;

194 (b) whether a decision involved a hearing or on-the-record decision;

195 (c) whether new evidence was submitted by a claimant after his or her hearing to  
196 the ALJ or to the Appeals Council; and

197 (d) data or other tracking mechanisms enabling ARPS and CPMS data to be related  
198 to a single claim through all case processing stages, including hearings, Appeals Council  
199 review, and remand by the Appeals Council or federal courts.

200 9. SSA should encourage feedback from SSA employees to identify other types of  
201 case-related data that should be captured, or suggest ways to facilitate the linking of SSA's  
202 multiple data reporting systems in order to improve overall data quality and quality assurance  
203 capabilities.