ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Memorandum

To: Committee on Adjudication
From: Amber G. Williams (Staff Counsel)
Date: April 1, 2013
Re: Draft Recommendation

The following draft recommendation is based on the Social Security Disability Adjudication Project, two related draft reports, and a statistical appendix, which present findings and recommendations based on legal and empirical analyses of the adjudication of SSDI and SSI claims. This draft has been updated based on feedback from Committee members and discussion and is intended to facilitate the Committee's discussion at its April 8, 2013 public meeting and not to preempt the Committee's discussion and consideration of the proposed recommendations. In keeping with the Conference's past practice, a draft preamble has also been included. The aim of the preamble is to explain the problem or issue the recommendation is designed to address, and the Committee should feel free to revise it as appropriate.

Achieving Greater Consistency and Accuracy in Social Security Disability Adjudications

Draft Recommendation

The Administrative Conference of the United States has undertaken many studies over the years relating to the Social Security disability benefits system.[1] It has issued a number of recommendations specifically directed at improving SSA's initial application and appeals processes,[2] as well as other recommendations more generally designed to improve agency

[1] 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).

[2] 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).

adjudicatory procedures.[3] The Conference last issued a recommendation on the Social Security disability benefits system over twenty years ago. The system has grown substantially since that time. Approximately 3.3 million disability claims are now filed at the state level annually,[4] which represents a 57% increase since 1990.[5] In a program of this size, adjudicating disability benefits claims in a fair, consistent, and timely manner is a monumental challenge.

Those cases flow through a nationwide, multi-step process, by which SSA determines whether a claimant is disabled and eligible for benefits. State agencies make initial disability determinations using federal guidelines. Claimants may file (and pursue) their own claims or they may choose to enlist the assistance of a representative, who may or may not be a lawyer. If benefits are denied, claimants may request reconsideration (in most states). If benefits are denied after reconsideration, claimants may request a hearing before an Administrative Law Judge (ALJ). ALJs adjudicate nearly 800,000 cases a year.[6] In FY 2011, about 56% of disability benefits claims were allowed at the ALJ hearing stage,[7] though more recent figures show a decline in this rate.[8] ALJ hearings, which may be in-person or by video teleconferencing, are conducted using a de novo standard of review, and generally follow the Administrative Procedure Act's adjudication procedures. Although ALJs preside at the hearings, decisionwriters typically write decisions for ALJs based on instructions from them. Usually,

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[3] *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).

[4] SOC. SEC. ADMIN., ANNUAL PERFORMANCE PLAN FOR FY 2013 AND REVISED PERFORMANCE PLAN FOR FY 2012, at 11 (2012).

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

[6] *Id.* at 13.

[7] HAROLD KRENT & SCOTT MORRIS, STATISTICAL APPENDIX: ANALYSIS OF ADMINISTRATIVE LAW JUDGE DISPOSITION AND FAVORABLE RATES IN FISCAL YEARS 2009 TO 2011 14 tbl. A-3 (2013) [hereinafter STATISTICAL APPENDIX].

[8] 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).

decisionwriters are not assigned to specific ALJs, but serve instead as part of a "pool" in each hearing office from which writing assignments for decisions are made.

Appeals Council review is the final step in the administrative process. The Appeals Council is comprised of about 125 Administrative Appeals Judges and Appeals Officers, and has discretionary authority to grant, deny, or dismiss a claimant's request for review, as well as remand the case back to an ALJ or issue a decision.[9] In FY 2012, the Appeals Council processed over 166,000 requests for review, a 30.7% increase from FY 2011.[10] In addition to processing requests for review, the Appeals Council has authority to identify cases for review on its "own motion" through use of "random or selective sampling" techniques.[11] Currently, however, the Appeals Council only reviews a national random sample of ALJ decisions as a quality assurance mechanism; the Appeals Council has not exercised its selective sampling authority in recent years. In FY 2012, the Appeals Council completed random review of 7,074 such decisions.[12] The Appeals Council publishes its decisions only rarely, in the form of Appeals Council Interpretations (ACIs), and its decisions sometimes serve as the basis for Social Security Rulings. Claimants who disagree with the final administrative decision may seek judicial review in federal court.

Adjudicators and other agency employees at both the ALJ hearing level and Appeals Council level use electronic case management systems to help manage their workflow and to provide case-related management information. The current system in use at the hearing level is

[9] 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.

[10] 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.

[11] 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).

[12] 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.*

the Case Processing Management System (CPMS), while the Appeals Council level uses the Appeals Council Review Processing System (ARPS). Not only do adjudicators and other staff use CPMS and ARPS in their day-to-day work, but the agency also uses data from these systems to identify and address trends and anomalies existing at the various levels of agency adjudication. While SSA has endeavored to build effective data reporting systems, limitations relating to linking the various systems, as well as data capture exist.

Not only does SSA process an extraordinary number of claims through a national, multi-tiered system, but, in doing so, the agency tries to ensure that decisionmaking is consistent and accurate at all levels of adjudication, and that legally sufficient decisions are issued that can withstand review by federal courts. Consistency and accuracy, however, have suffered under the strain of administering such a sprawling program. To be sure, an ALJ faces an enormous task in adjudicating hundreds of cases annually.[13] Nonetheless, divergent allowance rates among ALJs suggest that claims are being resolved in an inconsistent, if not inaccurate, manner. The Appeals Council similarly struggles to fulfill its error-correction and quality-review roles. That these steps may have room for improvement is evidenced by the 45% rate at which cases are remanded back to the agency from federal courts in recent years.[14] Bringing greater consistency and accuracy to the disability claims adjudication process will enhance the fairness and integrity of the program.

One area of particular concern—due to its high remand rate—is SSA's treating source rule, which generally affords "controlling weight" to the opinions of a claimant's treating physician, psychologist, or other acceptable medical source.[15] In the early 1990s, SSA sought to bring greater clarity and uniformity to the assessment of medical evidence by establishing regulatory standards for such evaluations. In practice, however, this evidentiary rule has not

[13] On average, for FY 2009 – FY 2011, ALJs issued 538.9 dispositions per year. *See* STATISTICAL APPENDIX, *supra* note 7, at 8 tbl. A-2.

[14] 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.

[15] *See* 20 C.F.R. §§ 404.1527(c), 416.927(c) (2012).

delivered on its promise of improving consistency. In recent years, erroneous application of the treating source rule has been cited as the basis for remand by the Appeals Council at a 10% frequency rate, and the frequency rate with which it is cited by federal courts is even higher at 35%.[16] Dramatic changes in the American health care system over the past twenty years also call into question the ongoing efficacy of the special deference afforded to the opinions of treating sources. Individuals typically visit multiple medical professionals in a variety of settings for their health care needs and less frequently develop a sustained relationship with one physician.[17] Moreover, difficulty in determining who among a wide range of medical professionals should be considered a treating source has bedeviled ALJs and reviewing courts, contributing to high remand rates.[18]

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

[16] *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).

[17] *See id.* at 25-33.

[18] *See id*. at 22-24, 33-35.

[DRAFT] RECOMMENDATION

ALJ Hearing Stage

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

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

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

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

Appeals Council

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

3. *Enhancing Communication*. SSA should make clear that an essential function of the Appeals Council is both to focus on consistent application of Social Security regulations and

policies on a systemic basis, and to disseminate advice and guidance to SSA policymakers, ALJs, and other lower-level decisionmakers. The Appeals Council should advise and assist policymakers and ALJs by:

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

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

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

(d) developing a program for ALJs to serve extended voluntary details on the Appeals Council in order to introduce a measure of peer review, enrich ALJ understanding of the appeals process, and benefit the Appeals Council by introducing the perspectives and insights of ALJs. In support of that effort, SSA should seek a waiver from the Office of Personnel Management (OPM) of its durational (120-day) limit on details, which, if granted, would enable detailed ALJs to gain a deeper knowledge of the Appeals Council than is possible under a shorter detail period. OPM should give favorable consideration to such a request.

4. *Expanding Focused "Own Motion" Review*. In order to focus attention on the unappealed decisions that most warrant review, thereby enhancing both accuracy and consistency, SSA should expand the Appeals Council's use of its "own motion" review by using selective review in a manner consistent with ALJ decisional independence. The Appeals Council should use announced, neutral, and objective criteria, including statistical assessments, to identify problematic issues or fact patterns that increase the likelihood of error and, thereby, warrant focused review. In addition, SSA should review unappealed decisions that raise issues whose resolution likely would provide guidance to ALJs and adjudicators. In expanding its "own motion" review, SSA must ensure that (1) selection-of-review criteria are done in a neutral fashion without targeting particular ALJs or other decisionmakers, and that (2) inclusion of cases in such review does not serve as the basis for evaluation or discipline. Thus, if necessary, SSA should revise its regulations through notice-and-comment rulemaking to clarify and expand the Appeals Council's use of selective sampling to identify for review decisions that:

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

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

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

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

5. SSA should consider giving ALJs greater discretion and flexibility when determining the appropriate weight to afford opinions from treating sources, consistent with the factors enumerated in the current regulatory scheme for evaluation of opinions of acceptable medical sources who are not deemed "treating" sources. Such factors should include: (a) length of the treatment relationship and frequency of examination; (b) nature and extent of the treatment relationship; (c) supportability of the medical source's opinion; (d) consistency of the medical source's opinion; (e) specialization of the medical source; and (f) any other factors that may

support or contradict a medical source's opinion. In all cases, ALJs should articulate the bases for the weight given to opinions from medical sources.

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

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

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

Statistical Quality Assurance Measures

7. SSA should consider enhancing its current data reporting systems in order to enable a more robust statistical quality assurance program. To enhance its current data reporting systems, such as the Case Processing Management System (CPMS) and the Appeals Council Review Processing System (ARPS) or any respective follow-on systems, SSA should consider how to associate types of cases and issues, regions, hearing offices, adjudicators, procedural elements and benchmarks, and decisional outcomes together. The goal of such systems should not only be objective evaluation of the agency's case processing operation, but also the effective utilization of data to inform policy formation and operational consistency.

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

(a) information related to any prior hearings;

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

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

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

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