



Recommendation 87-7

A New Role for the Social Security Appeals Council

(Adopted December 18, 1987)

The Social Security disability system is described generally in Recommendation 87-6 which focuses on the initial determination process at the state-level Disability Determination Service (DDS) offices. This Recommendation addresses the later stages of review by the Social Security Administration (SSA).¹

The first stage of review by federal decisionmakers is the third step in the process for disability claimants. Claimants disappointed after state-level initial and reconsideration determinations may then demand a hearing before an administrative law judge (ALJ) employed by the Social Security Administration. About 65% of such claimants do so. This is the first time in the process (except in certain demonstration projects or cases involving the termination of benefits) that a claimant has a face-to-face encounter with the decisionmaker. The hearings are de novo, and generally follow Administrative Procedure Act guidelines. Approximately 50% of appeals taken to an ALJ hearing result in the award of benefits.

The fourth, and final, level of administrative review is to the Social Security Appeals Council. This twenty-member body, created by regulation, and chaired by the Associate Commissioner for Hearings and Appeals, disposes of a staggering 50,000 cases annually. (About 40% of claimants who lose at the ALJ stage appeal.) In addition to appeals from ALJ decisions, the Appeals Council reviews, on its "own motion," selected cases where there has been a grant of benefits. The Appeals Council relies on analysts in its companion unit, the Office of Appeals Operations (OAO), to screen cases and make recommendations concerning disposition of the cases. Council members hold the same salary grade level as SSA ALJs. They perform purely a paper review on cases that are forwarded to them by OAO and assigned to them individually based on the geographical origin of the case. The Appeals Council acts on each appeal, although in most cases the request for review is summarily denied or dismissed. Because of the demands on each member (up to 500 cases per member per month), a typical case is likely to receive less than 15 minutes of paper review by the member. The Council almost never sits in panels or

¹ The Conference has previously addressed elements of the Social Security appeals process (focusing primarily on the ALJ hearing stage) in Recommendation 78- 2, *Procedures for Determining Social Security Disability Claims*, 1 CFR 305.78-2.



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conducts oral arguments. In recent years, approximately 5% of the cases reviewed result in reversals (i.e., awards of benefits), and another 7 to 15% are remanded to the ALJ.

After exhaustion of state and federal administrative remedies, a claimant may seek judicial review in the federal district court. In the years 1981 to 1986 the number of new SSA disability cases filed in the courts ranged from 9,000 to 26,000 per year.

In past years, the Appeals Council has to some extent played a policy-relevant role. Yet, as its caseload increased, it was by necessity limited to a narrow case correction function. Accordingly, its members had little time to devote to policy matters. Recently, the Appeals Council has come under attack from many fronts, including Congress, claimants and their representatives, and academicians, who have questioned both the Appeals Council's usefulness as an additional step in the adjudicative chain and the resulting delays caused to claimants who wish to proceed to court.

Critics have complained that the rate of reversals is so low that it fails to compensate for the additional delay caused to claimants who wish to seek judicial review. The Conference's study noted that because its members are so driven by the "tyranny of the caseload," it has failed to take advantage of its unique position as the final administrative review body – one that sees a diverse number of disability cases, and accordingly, can detect emerging problems, and identify new issues to be resolved and policies to be developed. Thus, any capabilities it should have in promoting consistency of lower-level decisionmaking, and policy integrity throughout the system, are thwarted, and it is left with little more than a case-handling role.

The Social Security Administration requested the Administrative Conference to study and analyze the operation of the Appeals Council.

Serious consideration was given to recommending outright abolition of the Appeals Council. This view was premised on the Appeals Council's present inability to do little more than add one more layer to the already-lengthy review bureaucracy. (This criticism was not intended as a denigration of Appeals Council members, whom the study found to be competent, dedicated, and cooperative.) Before recommending such a drastic, and irreversible step, however, the Conference felt that an attempt should be made to use the unique perspective and expertise of the Appeals Council to help correct the existing problem. The Conference believes that fundamental changes are needed to reduce the Council's caseload to a more manageable volume, so that individual cases can be given more attention and the Council can be a significant contributor to agency policymaking. Accordingly, to implement a system-reform



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function for the Appeals Council, the Conference makes the following Recommendations for modification of its structure, purpose and operations.

While the recommendation anticipates a reduced volume of cases for the Appeals Council, the Conference believes that improved fact-finding will result from the changes in initial determinations (*see* Recommendation 87-6), and that this will compensate for diminished factual review at the Appeals Council stage.

Recommendation

1. The Social Security Administration (SSA) should, as soon as feasible, restructure the Appeals Council in a fashion that redirects the institution's goals and operation from an exclusive focus on processing the stream of individual cases and toward an emphasis on improved organizational effectiveness. To that end, the Appeals Council should be provided the authority to reduce significantly its caseload and also be given, as its principal mandate, the responsibility to recommend and, where appropriate, develop and implement adjudicatory principles and decisional standards for the disability determination process. In particular, SSA should adopt the following structural reforms to improve the Appeals Council's ability to perform its new function.

a. *Focus on System Improvements.* SSA should make clear that the primary function of the Appeals Council is to focus on adjudicatory principles and decisional standards concerning disability law and procedures and transmit advice thereon to SSA policymakers and guidance to lower-level decisionmakers. Thus the Appeals Council should advise and assist SSA policymakers and decisionmakers by:

(1) Conducting independent studies of the agency's cases and procedures, and providing appropriate advice and recommendations to SSA policymakers; and

(2) Providing appropriate guidance to agency adjudicators (primarily ALJs, but conceivably DDS hearing officers in some cases) by: (a) Issuing, after coordination with other SSA policymakers, interpretive "minutes" on questions of adjudicatory principles and procedures, and (b) articulating the proper handling of specific issues in case review opinions to be given precedential significance. The minutes and opinions should be consistent with the Commissioner's Social Security Rulings. Such guidance papers should be distributed throughout the system, made publicly available, and indexed.



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b. *Control of its Caseload.* In order to fulfill its responsibility to develop, and to encourage utilization of, sound decisional principles and practices throughout SSA, the Appeals Council must be empowered to exercise its review sparingly, so that it may concentrate its attention on types of cases identified in advance by the Appeals Council. These types of cases might include a small sample of random cases or categories identified by the Secretary of Health and Human Services from time to time. To that end, the Secretary should direct the Appeals Council to design a new review process, subject to the Secretary's approval, that would continue to be part of the available administrative remedy for a claimant dissatisfied with an administrative law judge's (ALJ's) initial decision, but that would enable the Appeals Council to deny a petition for review if the issues it sought to raise are deemed inappropriate for the Appeals Council's attention. If a petition for review is denied, the ALJ's decision should be deemed to be final agency action.

c. *Improved Review of Individual Cases.* The Appeals Council, given a reduced caseload, should upgrade its handling of individual cases. In particular the Council should:

(1) Work more collaboratively, including as appropriate, considering cases en banc or in panels;

(2) Encourage claimant's representatives to submit briefs (including *amicus* briefs) on selected issues and evaluate the benefits of encouraging oral arguments in appropriate cases (utilizing existing authority to reimburse participants as necessary);

(3) Write more elaborate opinions, providing better reasoning and legal analysis and relying less on boilerplate and verbatim recitation of records;

(4) Avoid substitution of judgment on ALJ factual determinations;²

(5) Significantly reduce the time needed to initiate or deny review of cases and issue a final decision in most cases within 90 days of accepting review, unless an extension or delay request by a claimant is granted for good cause; and

(6) Specify that once the period for accepting review has passed, ALJ decisions should be deemed to be final agency action, and should be subject to reopening by the Appeals Council only in accordance with existing standards.

² In conjunction with this reliance on the record below, the Appeals Council should not permit new evidence to be introduced without good cause, although motions to remand to the hearing stage should be permitted. See Recommendation 78-2, ¶(c)(1); 1 CFR 305.78-2(c)(1).



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d. *Enhancement of Status of Appeals Council.* SSA should improve the status of the Appeals Council and insure high caliber appointment by:

(1) Reducing the size of the Council so that the Council can meet and act more collegially;

(2) Upgrading the salary level of members so that it is one level above SSA ALJs;

(3) Providing the members, by regulation, with the same civil service protections as accorded to career service personnel and by providing ALJs who agree to serve on the Council with assurances that they will receive reappointment to their former position upon completion of service; and

(4) Establishing merit selection criteria for appointment to the Appeals Council, giving preference to prior experience as an ALJ.

e. *Enhancement of Support Systems.* SSA should improve the support system provided to its Appeals Council by reorganizing the Office of Appeals Operations, providing law clerks to assist members, and updating production and communication systems.

f. *Enhance the Appeals Council's Visibility.* The Appeals Council should enhance its visibility both inside and outside the agency by reinstating the "visiting ALJ" program,³ instituting exchange programs with other SSA components, seeking publication of precedent by a recognized reporter service, and encouraging other outreach and bar-related activities.

2. If the reconstituted Appeals Council does not result in improved policy development or case-handling performance within a certain number of years (to be determined by Congress and SSA), serious consideration should be given to abolishing it.

Citations:

52 FR 49143 (December 30, 1987)

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³ The visiting ALJ program allowed for one-month temporary duty by an ALJ on the Appeals Council. SSA should consider longer intra-agency details in the future.