



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Memorandum

To: Committee on Adjudication
From: Amber G. Williams (Staff Counsel)
Date: February 27, 2013
Re: Draft Recommendation

The following draft recommendation is based on the Social Security Disability Adjudication Project and two related reports, which present findings and recommendations based on legal and empirical analyses of the adjudication of SSDI and SSI claims. This draft is intended to facilitate the Committee's discussion at its March 6, 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 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 adjudicatory procedures.³ The Conference last issued a recommendation on the Social Security

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); and Recommendation 78-2, *Procedures for Determining Social Security Disability Claims*, 43 Fed. Reg. 27,508 (June 26, 1978).

³ E.g., 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*



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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 staggering 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 ALJ hearings, which may be in-person or by video teleconferencing, are conducted using a de novo standard of review, and generally follow Administrative Procedure Act formal adjudication procedures. Although ALJs preside at the hearings, decisionwriters—rather than ALJs—typically write the decisions to allow or deny benefits claims based on instructions from the ALJ. Most often, 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. In FY 2011, about 53% of disability benefits claims were allowed at the ALJ hearing stage,⁷ though more recent figures show a significant decline in this rate.⁸

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 __ (2013) (noting 43% allowance rate from September 2012 through January 2013).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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. In FY 2012, the Appeals Council processed over 165,000 requests for review, a 30.7% increase from FY 2011.⁹ In addition to processing requests for review the Appeals Council conducts "own motion" review of a national random sample of ALJ decisions, as a quality assurance mechanism. In FY 2012, the Appeals Council completed pre-effectuation review of 7,074 such decisions,¹⁰ agreeing with the ALJ's determination 82.5% of the time, and either remanding or issuing corrective decisions approximately 16% of the time.¹¹ The Appeals Council publishes its decisions only rarely, in the form of Appeals Council Interpretations (ACI), and its decisions may also serve as the basis for Social Security Rulings. Claimants who disagree with the final administrative decision may seek judicial review in federal court.

Not only does SSA process an extraordinary number of claims through a national, multi-tiered system, but, in doing so, the agency must ensure that decisionmaking is consistent and accurate at all levels of adjudication, and that legally sufficient decisions are issued in case of review by federal courts. Consistency, however, has suffered under the strain of administering such a sprawling program. To be sure, ALJs face an enormous task in adjudicating hundreds of cases annually. Nonetheless, divergent allowance rates among ALJs suggest that claims are being resolved in an inconsistent manner. The Appeals Council similarly struggles to fulfill its error-correction and quality-review roles. These steps may have room for improvement, as evidenced by the 45% rate at which cases are remanded back to the agency from federal courts in recent years.¹² Bringing greater consistency and accuracy to the disability claims adjudication process will enhance the fairness and integrity of the program.

⁹ Soc. Sec. Admin., Office of Appellate Operations, Executive Director's Broadcast, at 1 (Oct. 19, 2012).

¹⁰ *Id.* at 3. Pre-effectuation review is review conducted of an ALJ allowance decision before action has been taken to effectuate (*i.e.*, pay) the claim.

¹¹ *Id.* At the end of the FY 2012, there were 741 own motion review cases still pending final action.

¹² STATISTICAL APPENDIX at 54 tbl. A-24.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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 claimants’ treating physicians (or other acceptable medical sources).¹³ 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 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%.¹⁴ 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 now 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.¹⁵ Moreover, difficulty in determining whom among a wide range of medical professionals should be considered a treating source has bedeviled ALJs and reviewing courts, contributing to high remand rates.¹⁶

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. The study 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, nationwide system.

¹³ See 20 C.F.R. §§ 404.1527(c), 416.927(c) (2012).

¹⁴ 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) [hereinafter TREATING PHYSICIAN RULE REPORT].

¹⁵ See TREATING PHYSICIAN RULE REPORT at 25-33.

¹⁶ *Id.* at 22-24, 33-35.



[DRAFT] RECOMMENDATION

A. ALJ Hearing Stage

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

(a) requiring claimants or their representatives to submit pre-hearing briefs in a standardized format that, among other things, summarizes the medical evidence and justification for claimants' eligibility for benefits;

(b) expanding the use of video hearings, in a manner consistent with sound technological practices, that balances improved efficiency (*i.e.*, timeliness and costs of adjudication) and fairness of the proceedings and participants' satisfaction with them. SSA may wish to offer incentives to claimants who opt for video hearings, such as faster scheduling of hearings (as compared to in-person hearings) or 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.

B. Appeals Council

2. *Balancing Error-Correction and Systemic Review Functions.* To promote the consistent application of policy and adjudication of disability benefits claims across a nationwide program, SSA should ensure that the Appeals Council strikes an appropriate balance between, on the one hand, its error-correction function when exercising discretionary review of individual claimant's requests for review, and, on the other hand, 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.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

3. *Enhancing Communication.* SSA should make clear that the primary 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 adjudicators by:

- (a) issuing 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 publically available through posting on SSA's website or other similar means of public dissemination;
- (b) continuing, to the greatest extent feasible, sending 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, as well, receive notification of remand decisions; and
- (c) developing a program for ALJs to serve extended details on the Appeals Council in order to introduce a measure of peer review and enrich ALJ understanding of the appeals process. In support of that effort, SSA should seek a waiver from the Office of Personnel Management (OPM) of the 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.

4. *Expanding "Own Motion" Review.* In order to focus attention on the decisions that are most likely to warrant review, thereby enhancing both efficiency and programmatic consistency, SSA should expand the Appeals Council's use of own motion review in a manner consistent with ALJ decisional independence. If necessary to achieve this goal, SSA should consider revising its existing regulations through notice-and-comment rulemaking. The Appeals Council should use published neutral and objective criteria, including focused statistical



sampling, to identify those ALJs whose decision rates for allowances or denials place them significantly outside the rates of the majority of their peers. SSA must also ensure that selection of review criteria is done without referencing, or targeting, particular ALJs or other decisionmakers, and that inclusion of cases in such review does not serve as the basis for evaluation or discipline. Thus, SSA should consider expanding the Appeals Council's own motion review by:

- (a) reviewing a sample of the decisions of ALJs whose allowance or denial rates are more than 2 standard deviation (SD) above or below the mean in two consecutive years. The mean and SD used to define these cutoffs should be adjusted each year based on the most recent data available. The review should be discontinued when the allowance or denial rates for such ALJs have not been more than 2 SD above or below the mean for one year; or
- (b) reviewing a sample of the decisions of ALJs whose allowance or denial rates are more than 2 SD above or below the expected rate in two consecutive years. Expected allowance rates would be determined for each ALJ from a predictive model that accounts for important characteristics of the portfolio of cases reviewed by that ALJ, and other relevant variables. The review should be discontinued when the allowance or denial rates for such ALJs have not been more than 2 SD above or below the expected rate for one year; and
- (c) reviewing cases on a targeted basis according to certain hearing characteristics or policy areas that it has identified as being particularly challenging for ALJs to apply. These cases should be reviewed with the goal of providing policy clarifications.

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

5. SSA should consider revising its regulations to eliminate the controlling weight aspect of the treating source rule. Instead, SSA should consider giving ALJs greater discretion and flexibility when determining the appropriate weight to afford opinions from treating sources, in line with the factors enumerated in the current regulatory scheme for evaluation of opinions from medical professionals 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.

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,” ignores the realities of the current health care system. For many Social Security disability claimants, these medical professionals are their usual, treating source of medical care for physical and mental illnesses. To better reflect the way medical care is currently delivered in the American health care system, 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 ALJs, 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.

D. 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, including 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 and ARPS by ensuring that these data reporting systems capture (as appropriate):



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- (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 mechanism enabling CPMS and ARPS 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 also encourage feedback from SSA employees to identify other variables 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.