Comment from Judge Daniel F. Solomon on the Draft Reports for the Social Security Disability Adjudication Project

Thank you for the reports. They are thorough and well-reasoned and I agree with most of it, but I have a few questions and comments. Please note that I am submitting the following for myself, not for FALJC, DOL, or any other entity.

As a predicate, sometimes the SSA Appeals Council and some of the courts give "lip service" to the substantial evidence test and become defacto fact finders. I would hope that someone is documenting this phenomenon.

Specific Issues

1. Treating physician rule.

a. To what extent is the rule applied at the SSA initial and reconsideration levels?

b. With what frequency has it been applied at step 3 of the sequential evaluation?

c. This should be part of a larger discussion about "credibility" and "bias" whether or not the rule is in place.

2. Achieving Greater Consistency.

a. Recommendation 14: "Term" of disability.

The report notes that for every dollar spent on CDRs SSA gets back $10. P. 83. In other publications SSA states that for every dollar spent on vocational rehabilitation (VR), it gets back $7. According to the Council of State Administrators of Vocational Rehabilitation, the individuals who completed their VR service plans last year and went to work will earn approximately $3.5 billion in wages during their first year of work. During that year, these new wage earners will pay approximately $320 million in Federal taxes; $95 million in State income taxes; and $520 million in Social Security and Medicare taxes (self and employer).These individuals will be able to pay back the cost of their rehabilitation services, through taxes, in just 2 to 4 years. In addition, many of these individuals will generate projected savings to the Federal Treasury and the Social Security Trust Fund of $6 for every dollar reimbursed to VR for successfully serving Social Security disability beneficiaries, i.e., totaling a projected $470.3 million in savings for one fiscal year. Extrapolating this, reduced to present value, for the work life expectancy of an average successful beneficiary, the return on investment is probably more than $100 for each dollar spent and "takers" become "makers" and will not draw from the fund, and will pay into it, to IRS, and this starts to ripple into other revenue streams.

Although there is an SSI reg that addresses referral to state vocational rehabilitation, 20 CFR 416.1710, there isn't one in the Disability Benefits section.

The Americans with Disabilities Act (ADA),1990, has made a tremendous impact on American life and culture and is an important civil rights act designed to ensure that people with disabilities enjoy

the same freedoms as everyone else. Additionally, the 1992 Amendments to the Rehabilitation Act of 1973 ensure consumer choice in career opportunities. Other agencies such as DOL and Education have huge VR projects. Note the One-Stop service delivery system created under the Workforce Investment Act of 1998 (WIA). SSA should be ahead of the curve, but is a laggard. The SSA Ticket to Work program is reactive, rather than pro-active.

b. Streamline the adjudication process.

In some states, applicants for almost ANY government benefit are FORCED to apply for SSI. To a reasonable degree of probability, that is why there are so many claims per population in states like Illinois and Ohio. Just because a claim for unemployment or welfare was filed does not mean the claimant has a medically determinable impairment. Why should a claimant who cannot prove a "severe" impairment at step 2 of the sequential evaluation at the DDS level have a right to an APA hearing? Should there be any threshold?

c. Other factors that result in inconsistencies.

The Social Security Act is supposed to be a "humanitarian" statute, the process is "nonadversarial," and any analogy to hotly contested litiation is probably unwarranted. However, why must a judge develop the record when the claimant is represented by a lawyer? See p. 7.

What proportion of cases are decided at step 5, after the burden has shifted to the agency? Under the grids, claimants with a similar medical profile (residual functional capacity) may be "not disabled" as a younger person but "disabled" when closely approaching advanced age. What is the ratio of paid claims of younger individuals at the state agency level to those at the hearings level? What percentage of the remands concerns this level of inquiry? SSA has not updated the medical vocational guidelines, which are outdated, as they are based on the Department of Labor Dictionary of Occupational Titles, last updated in 1991. Is there a public policy reason why the burden shifts for "younger individuals" who do not meet or equal a listed impairment? These claims can be dismissed by a summary decision.

Some lawyers boast, with some justification, that they never lose. There is no opponent to rebut claimant's evidence and few vocational experts (VEs) stand up to vigorous cross examination. As stated above, the standard vocational materials are flawed.

Have you considered the "burden of proof" standard under the APA? "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C. § 556(d). The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. Director, OWCP, Department of Labor v. Greenwich Collieries [Ondecko], 512 U.S. 267 (1994). "[N]otwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with [the APA]; 5 U.S.C. § 554(c)(2). What about SSA hearings?

Somebody should track the geographic array:

http://www.offthechartsblog.org/the-geography-of-disability/

http://www.cdc.gov/minorityhealth/populations/atrisk.html#Disabilityrom

Conclusion

From my perspective, there is no problem with adjudication at steps 1-4.

At step 1, I suggest that every applicant under 55 who does not have a "compassionate" award be referred for vocational rehabilitation. Money spent at this level may yield a boon for the trust fund.

To justify its budget, SSA actually tries to entice people to apply, even when they have a questionable claim. For example, almost everyone now filing for early retirement at 62 is advised to file a claim alleging disability to 1. get eligible for medicare and 2. get benefits paid as if they retired at age 66. This practice should stop. It may be that come PPACA in January, 2014, there will be less of an incentive to apply for medicare and this will benefit that fund, also.

At step 2 firm up "severe". Some of these claims can be dismissed by a summary decision.

Step 3 is mostly a medical determination. I do not think that the agency has a handle on how to evaluate a combination of impairments, but few appeals are rendered at this step. These claims can be awarded by a summary decision.

Step 4 is inapplicable to most SSI claimants as most have no earnings record. Few claims are appealed on this basis, especially after *Barnhart v. Thomas*, 540 U.S. 20 (2003), where a judge found that claimant's impairments did not prevent her from performing her past relevant work as an elevator operator, rejecting her argument that she is unable to do that work because it no longer exists in significant numbers in the national economy. Justice Scalia, delivering the opinion concluded it is irrelevant under SSA Regulations whether the job actually exists. [I think this is a miscarriage of justice, but I do not run the railroad. The only elevator operator job I am aware of is at the Supreme Court.]

Most of the problems occur at the 5th step. I think that most of the appeals are at this level. I think that the medical vocational guides should be scrapped for younger individuals and if they can perform a full range of sedentary work, a full hearing is unnecessary. [There is a minority view that anyone under 50 should have to meet or equal at step 3 to prevail.]

For older individuals or those who cannot perform a full range of sedentary work, I think that there would be greater consistency, judicial economy and the record would be cleaner if there were an adversarial proceeding at this level. I think that inserting a prosecutor at this level would be cost productive. Looking at the statistics presented, I estimate that under half the number of hearings currently held would be necessary.

Respectfully,

Daniel F. Solomon, Committee Member