Achieving Greater Consistency in Social Security Disability Adjudication: An Empirical Study and Suggested Reforms

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INTRODUCTION

Adjudication of social security disability claims has received great attention, both because of the increasing number of claims adjudicated each year[1] and because of perceived problems of inconsistencies in adjudication.[2] Administrative Law Judges ("ALJs") adjudicate roughly 800,000 cases a year,[3] and social security disability cases represent about 5% of the entire number of civil cases filed in U.S. district courts[4] and one-third of all civil cases involving the federal government.[5] The adjudication system has been plagued by delays, with substantial backlogs preventing needy individuals from receiving their due.[6] Moreover, the sharply divergent allowance rates among ALJs,[7] strongly suggest that the claims are being resolved in an inconsistent manner, which undermines the integrity of the benefits system. ALJs labor under a SSA target of

[1] SOC. SEC. ADVISORY BOARD, ASPECTS OF DISABILITY DECISION MAKING: DATA AND MATERIALS 54 fig. 49 (2012), *available at* http://www.ssab.gov/Publications/Disability/GPO_Chartbook_FINAL_06122012.pdf [hereinafter ASPECTS OF DISABILITY DECISION MAKING].

[2] Damian Paletta, *Disability-Claim Judge Has Trouble Saying 'No'*, WALL STREET J., May 19, 2011; Adam Smeltz, *Explosion of Disability Payouts Hobbles Program*, PITTSBURGH TRIB.-REV., Aug. 11, 2012.

[3] SOC. SEC. ADMIN. ANNUAL PERFORMANCE PLAN FOR FY 2013 AND REVISED PERFORMANCE PLAN FOR FY 2012 13 (2012), *available at* http://www.ssa.gov/performance/2013/FY%202013%20APP%20and%20Revised%20Final%20Performance%20Plan%20for%20FY%202012.pdf [hereinafter ANNUAL PERFORMANCE PLAN].

[4] U.S. DISTRICT COURTS – CIVIL CASES FILED, BY NATURE OF SUIT tbl. 4.4, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2010/Table404.pdf (last visited Feb. 24, 2013).

[5] U.S. DISTRICT COURTS – CIVIL CASES COMMENCED, BY BASIS OF JURISDICTION AND NATURE OF SUIT, DURING 12-MONTH PERIODS ENDING DECEMBER 31, 2010 AND 2011 tbl. C-2, *available at* http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2011/Dec-11/C02Dec11.pdf (last visited Jan. 30, 2013).

[6] Reducing the backlog is an SSA priority. ANNUAL PERFORMANCE PLAN, *supra* note 3, at 11.

[7] Using data provided by SSA on adjudication outcomes from FY 2009 to FY 2011, we found an average allowance rate of 56%, and a standard deviation ("SD") of 15%. STATISTICAL APPENDIX – ANALYSIS OF ADMINISTRATIVE LAW JUDGE DISPOSITION AND ALLOWANCE RATES (FISCAL YEARS 2009 – 2011) 13 (Apr. 3, 2013) [hereinafter STATISTICAL APP.]. The yearly allowance rates ranged from 4% to 98%, with 95% of the rates falling between 26% and 85%. *Id.* at 13-14. Additional information on the data analysis is provided in Part II**;** *see also* http://www.ssa.gov/appeals/DataSets/03_ALJ_Disposition_Data. html (listing disposition rates for all SSA ALJs). Note that the terms "allowance," "grant," and "favorable" are used interchangeably in this report.

adjudicating 500-700 cases a year.[8] Although substantial progress has been made to minimize delays in adjudicating claims, the 350-day median wait[9] for a hearing before an ALJ is still unconscionable from the perspective of claimants who frequently are in dire need.[10]

Suggestions for reform range from creating a new Article I court system to handle such claims, as with veterans' claims,[11] to requiring a government representative to participate in ALJ hearings.[12] Alterations in the adjudication system may ensure more consistent results and possibly save hundreds of millions of dollars annually.

The purpose of the current study is not to reinvent the wheel but to consider whether, after reading the voluminous commentary previously written, interviewing a range of interested parties and assessing statistical data, reforms can be suggested either to streamline the adjudication process or help ensure consistency among ALJs, the Appeals Council ("Council"), and federal courts in assessing disability claims. A consensus exists in the academy and among commentators that the disparities in allowance rates among ALJs are alarming because, by and large, the claims share similar

[8] SSA's Chief ALJ articulated the goal in a 2007 Memorandum. SOC. SEC. ADMIN. OFFICE OF THE INSPECTOR GENERAL, CONGRESSIONAL RESPONSE REPORT: OVERSIGHT OF ADMIN. LAW JUDGE WORKLOAD TRENDS, A-12-11-01138, at 3 n.4 (Feb. 2012) [hereinafter OVERSIGHT OF ALJ WORKLOAD TRENDS].
[9] *See Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 112th Cong. (June 27, 2012) (statement of Michael J. Astrue, Comm'r, Soc. Sec. Admin.), *available at* http://waysandmeans.house.gov/uploadedfiles/astrue_testimony.pdf [hereinafter Astrue Testimony].
[10] ASPECTS OF DISABILITY DECISION MAKING, *supra* note 1, at 66 fig. 61 (2012).
[11] *See* Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731, 778 (2003) [hereinafter *Alternative Approaches*]; Richard E. Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 B.Y.U. L. REV. 461, 528 (1990).
[12] STAFF OF S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, PERMANENT SUBCOMM. ON INVESTIGATIONS, 112TH CONG., SOC. SEC. DISABILITY PROGRAMS: IMPROVING THE QUALITY OF BENEFIT AWARD DECISIONS, 5 (2012), *available at* http://www.hsgac.senate.gov/subcommittees/investigations/hearings/social-security-administrations-disability-programs [hereinafter IMPROVING THE QUALITY OF BENEFIT AWARD DECISIONS].

characteristics within a regional office, and to a significant extent, across the country.[13] Claims based on mental impairments and muscular skeletal disease dominate the system[14] and such claims largely turn on subjective testimony. Thus, although there should be some differences given the divergent social and economic conditions in various locales, the range in allowance rates should be much narrower.

METHODOLOGY

We initially canvassed much of the relevant literature on SSA adjudication, and familiarized ourselves with the governing statutes and regulations. We then conducted interviews to assess various perspectives on the challenges in and possible improvements to the SSA disability adjudication system. Although we focused on the ALJ level, we also considered adjudications before the Appeals Council and district courts. We talked with SSA officials, claimants, claimant representatives, ALJs, decisionwriters, federal judges, and magistrates. Those discussions and readings enabled us to fine tune a request for data to SSA to permit us to run a regression analysis on correlates of ALJ decisionmaking. At the same time, those discussions served as the predicate for hypotheses and later conclusions on how best to accomplish reform.

Although we received much helpful data from SSA, some relevant data could not be examined. Part of the reason stemmed from limitations due to the way SSA gathers and stores data, which we comment on later. Part of the reason as well arose from SSA's

[13] SOC. SEC. ADVISORY BOARD, IMPROVING THE SOC. SEC. ADMIN.'S HEARING PROCESS 6 (Sept. 2006) [hereinafter IMPROVING THE HEARING PROCESS]; *see also* Richard J. Pierce, *What Should We Do About Social Security Disability Appeals?*, REGULATION, Fall 2011, at 41 (advocating for elimination of ALJ review), *available at* http://www.cato.org/sites/cato.org/files/serials/files/regulation/2011/9/regv34n3-3.pdf.

[14] For dispositions issued from Fiscal Year ("FY") 2009 to FY 2011, musculoskeletal impairments were cited in 41% of claims and mental impairments were cited in 26% of claims. *See* STATISTICAL APP., *supra* note 7, at 53 tbl. A-23. No other impairment was cited in more than 6% of claims. *Id.* Additional information on impairment frequency is provided in Part IV.E.10 of the STATISTICAL APPENDIX.

concern about the privacy of ALJs. Our analyses of correlates of ALJ decisionmaking nonetheless generated useful information to the study.

I. STRUCTURE OF SSI AND SSDI ADJUDICATION

The Supplemental Security Income ("SSI") program provides a minimum level of income to people who are aged, blind, or disabled.[15] To be eligible for SSI, applicants must be both indigent and disabled.[16] Social Security Disability Insurance ("SSDI") benefits in contrast are not based on the financial wherewithal of the claimant, but rather are predicated instead on a determination that claimants are both insured and disabled.[17] The programs share the same definition of "disability": inability "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than [12] months."[18] SSA must engage in the following five-step process to determine whether an individual is disabled:[19]

1. SSA will consider the individual's work activity. If the individual is engaged in substantial gainful activity, the agency will find the individual *not disabled*.[20]
2. SSA will consider the severity of the individual's medical impairment(s). If the agency determines that the individual does not have a severe medically determinable physical or medical impairment, or a combination of such impairments that is severe and meets the duration requirement, it will find the individual *not disabled*.[21]

[15] 42 U.S.C. § 1382c(a) (2013); 20 C.F.R. § 416.110 (2013).
[16] Nobles v. Comm'r of Soc. Sec. Admin., 2002 WL 553735, at *1 (E.D. Tex. Apr. 10, 2002) (citing H. R. Rep. No. 92-231, (1972)); *see also* 42 U.S.C §§1382(a), 1382c(a)(3)(A)–(C) (2013).
[17] 42 U.S.C. § 423 (2013). Social Security deducts an amount from a worker's paycheck if the worker earns sufficient wages. Every quarter of the year in which the worker pays Federal Income Contributions Act ("FICA") taxes is considered a quarter of coverage. Most claimants must work forty quarters of coverage to be considered "insured." *See* 20 C.F.R. § 404.130, 404.140 (2013).
[18] 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A) (2013).
[19] 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4) (2013).
[20] *Id.* §§ 404.1520(a)(4)(i), (b), 416.920(a)(i), (b).
[21] *Id.* §§ 404.1520(a)(4)(ii), (c), 416.920(a)(4)(ii), (c).

3. SSA will continue to consider the severity of the individual's medical impairment(s). If SSA determines that an impairment meets or equals one of the listings in appendix 1 to subpart P of part 404, SSA will find the individual *disabled*.[22] If SSA does not find the individual disabled, before the agency moves from this step to the next, it will assess an individual's residual functional capacity ("RFC").[23]
4. SSA will consider its assessment of the individual's RFC and past relevant work. If the agency finds that the individual *can* do his or her past relevant work, it will find the individual *not disabled*.[24]
5. SSA will consider its assessment of the individual's RFC, as well as his or her age, education, and experience to determine whether the individual can make an adjustment to other work in the economy. If the individual *can* make such an adjustment, SSA will find the individual *not disabled*. If the individual *cannot* make such an adjustment, SSA will find the individual *disabled*.[25]

Social Security disability claimants must complete an application with the local Social Security office or online.[26] The local office determines if the applicant is indigent when applying for SSI or insured when applying for SSDI.[27] If the claimant is not entitled to benefits under either program, a notice of denial is mailed to the claimant; if the claimant is qualified, the file is sent to a state government agency operating as a Disability Determination Service ("DDS") under contract with SSA.[28] DDS may then gather medical documents or order an examination by a contracting physician or

[22] *Id.* §§ 404.1520(a)(4)(iii), (d), 416.920(a)(4)(iii), (d). The Appendix 1 "listings" include the following categories of impairments: growth impairment, musculoskeletal system, special senses and speech, respiratory system, cardiovascular system, digestive system, genitourinary impairments, hematological disorders, skin disorders, endocrine disorders, congenital impairments that affect multiple body systems, neurological disorders, mental disorders, malignant neoplastic diseases, and immune system disorders. *Id.* § 404 app. 1.
[23] *Id.* §§ 404.1520(a)(4), (e), 416.920(a)(4), (e).
[24] *Id.* §§ 404.1520(a)(4)(iv), (f), (h), 416.920(a)(4)(iv), (f), (h).
[25] *Id.* §§ 404.1520(a)(4)(v), (g), (h), 416.920(a)(4)(v), (g), (h).
[26] James A. Maccaro, *The Treating Physician Rule and the Adjudication of Claims for Social Security Disability Benefits*, 41 SOC. SEC. REPORTING SERV. 833, 833 (1993). A similar process occurs when Continuing Disability Reviews ("CDRs") are undertaken for those already receiving benefits. *See infra* Part VIII.
[27] 20 C.F.R. §§ 404.902 to .905, 416.1402 to .1405 (2013); *see also* Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Soc. Sec. Admin.'s Appeals Council*, 17 FLA. ST. U. L. REV. 199, 219 (1990) [hereinafter *Fourth Bite at the Apple*].
[28] *Fourth Bite at the Apple*, *supra* note 27, at 219.

psychologist, termed a "consultative examination," to make a decision regarding the claimant's disability status.[29] DDS approval rates in the states vary considerably.[30]

In all but ten states, a dissatisfied claimant may ask for a "reconsideration."[31] A reconsideration involves the same procedures as an initial determination, but the decision is made by a different team in the same office.[32] The ten states that do not have the reconsideration level of review are termed "prototype" states.[33] As a whole, states approve less than 40% of disability claims.[34]

A claimant may appeal a decision within sixty days,[35] and about one-third of those whose claims were denied in fact appealed.[36] An ALJ presides over the appeal, conducting an in-person de novo hearing.[37] No deference is afforded the DDS determination, and the ALJ may consider additional medical examinations, vocational or medical expert testimony, and personally question the claimant or other witnesses.[38] Although ALJs preside at the hearings, they do not typically write the opinions. Rather, they provide instructions to decisionwriters, who may not even be attorneys, to write the opinions after they decide whether to allow or deny benefits.[39] The decisionwriters

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[29] *Id.*
[30] *See* ASPECTS OF DISABILITY DECISION MAKING, *supra* note 1, at 43-44 figs. 38-39; *see also* Jon C. Dubin & Robert E. Rains, *Scapegoating Social Security Disability Claimants (and the Judges Who Evaluate Them)*, AMERICAN CONSTITUTION SOCIETY ISSUE BRIEF, Mar. 2012, at 4-5.
[31] 20 C.F.R. §§ 404.907, 416.1407 (2013). Ten states do not permit reconsideration. *See* Soc. Sec. Admin., POMS § DI 12015.100-Disability Redesign Prototype Model (Feb. 13, 2012), *available at* https://secure.ssa.gov/poms.nsf/lnx/0412015100.
[32] *See* Astrue Testimony, *supra* note 9.
[33] *See infra* Part VII.
[34] For more specific figures and differences in allowance rates among the states, see ASPECTS OF DISABILITY DECISION MAKING, *supra* note 1, at 43-44 figs. 38-39 (2012).
[35] 20 C.F.R. §§ 404.909, 416.1409 (2013).
[36] SOC. SEC. ADMIN., ANNUAL REPORT OF THE SUPPLEMENTAL SECURITY INCOME PROGRAM FY 2011 88 tbl. V.C1 (2011), *available at* http://www.ssa.gov/OACT/ssir/SSI11/ssi2011.pdf.
[37] 20 C.F.R. §§ 404.929, 416.1429 (2013).
[38] *See id.* 404.944, 416.1444.
[39] *Clearing the Backlog: Hearing Office Performance: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 110th Cong. (Sept. 16, 2008) (statement of Hon. Ron Bernoski, President, Assoc. of Admin. Law Judges).

usually do not attend the hearings. SSA management, as opposed to ALJs, supervises the decisionwriters, who typically serve as part of a "pool" in each hearing office from which writing assignments for decisions are made.[40] Senior attorney advisors, drawn from the ranks of decisionwriters, now can review claims, and order payment on their own based on on-the-record decisions.[41] If they conclude that the case for payment is not clear, they transmit the files to the ALJs to schedule hearings.

In contrast to many administrative adjudications, the agency is not represented at the hearing,[42] while we found claimants to be represented 77% of the time.[43] Another study notes that at ALJ hearings, about 75% of representatives are attorneys and 20% are non-attorneys.[44] The percentage of cases in which claimants are represented has soared in the past thirty years.[45] ALJs have the duty to develop the record where needed, irrespective whether the claimant is represented.[46] ALJs in the past several years have determined that disability is warranted in roughly 60% of the cases decided, although the

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[40] *See* Jeffrey S. Wolfe, *Civil Justice Reform in Social Security Adjudications*, 64 ADMIN. L. REV. 379, 408-09 (Spring 2012) [hereinafter Wolfe].

[41] Astrue Testimony, *supra* note 9.

[42] There are a number of administrative adjudications where an agency is represented at the hearings. *See, e.g.*, 8 C.F.R. §§ 240 *et seq.* (2012) (providing regulations allowing for agency representation at U.S. Department of Justice Executive Office for Immigration Review proceedings and issued pursuant to the Immigration and Nationality Act of 1952); 20 C.F.R. §§ 725 *et seq.* (2012) (providing regulations allowing for agency representation at the U.S. Department of Labor's Federal Black Lung Program proceedings and issued pursuant to the Black Lung Benefits Act); 17 C.F.R. § 3.60 (2012) (providing regulations allowing for agency representation at the U.S. Commodity Futures Trading Commission proceedings and issued pursuant to the Commodity Exchange Act); 16 C.F.R. §§ 3 *et seq.* (2012) (providing regulations allowing for agency representation at the Federal Trade Commission proceedings and issued pursuant to the Federal Trade Commission Act).

[43] Among dispositions issued from FY 2009 to FY 2011, we found a claimant representative to be present in 77% of hearings. STATISTICAL APP., *supra* note 7, at 48 & tbl. A-21, fig. A-15. This percentage was the same in each of the three years examined. *Id.* We determined a correlation between representation and successful appeals. For an average ALJ, the expected allowance rate was 64% when a representative was present, but only 47% in hearings without a representative. *Id.* at 48. However, it is unclear whether that correlation arises because of the effectiveness of the representatives or due to the fact that representatives agree to help claimants only in stronger cases.

[44] ASPECTS OF DISABILITY DECISION MAKING, *supra* note 1, at 60 fig. 55 (figures for FY 2010).

[45] The number of represented cases in 1971, for instance, was 20,000; today it is over 700,000. *See* Wolfe, *supra* note 40, at 406.

[46] *See, e.g.*, Hildebrand v. Barnhart, 302 F.3d 836, 838 (8th Cir. 2002).

percentage has declined in recent years.[47] The overall allowance rate (*i.e.*, percentage of Fully or Partially Favorable decisions issued by ALJs and senior attorneys combined) dropped from 61% in FY 2009 to 50% in FY 2012.[48]

If the claimant is dissatisfied with the ALJ's decision, the claimant has sixty days to appeal the adverse decision to SSA's Appeals Council,[49] although the Council is not required by law to review each appeal on the merits.[50] The Appeals Council will review a case if: (1) the ALJ committed an abuse of discretion; (2) there is an error of law; (3) the ALJ's decision was not supported by substantial evidence; or (4) there is a broad policy or procedural issue that might affect the public interest.[51] The Appeals Council may affirm, modify, reverse, or remand the ALJ's decision.[52] The Appeals Council also may exercise the authority to review cases prior to effectuation on its "own motion," also called "own motion review."[53]

The Appeals Council represents the final step in the administrative process. A claimant may appeal the agency's decision within sixty days to federal court.[54] The Department of Justice is in charge of litigation in federal court, as it is for most

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[47] *See* STATISTICAL APP., *supra* note 7, at 14-15 & tbl. A-3. There is no objective way to measure whether ALJs or state DDS systems measure "disability" more accurately. The ALJ proceeding aligns with traditional notions of due process given that testimony is allowed. For one intriguing study concluding that ALJs are more likely to get it "right," see Hugo Benitez-Silve, Moshe Buchinsky, & John Rust, *How Large Are the Classification Errors in the Social Security Disability Award Process?*, THE NAT'L BUREAU OF ECON. RESEARCH, Jan. 2004.

[48] *See* STATISTICAL APP., *supra* note 7, at 15 tbl. A-3 (FY2009 data); Data.gov, ALJ Disposition Data, https://explore.data.gov/Social-Insurance-and-Human-Services/ALJ-Disposition-Data/zdyy-hq2m (last visited Mar. 1, 2013) (FY2012 data).

[49] 20 C.F.R. §§ 404.968(a), 416.1468(a) (2013).

[50] Astrue Testimony, *supra* note 9.

[51] 20 C.F.R. §§ 404.970(a), 416.1470(a) (2013). The Appeals Council will also, under certain circumstances, review a case involving new and material evidence if such evidence relates to the period on or before the date of the ALJ hearing decision, and the ALJ's action, findings, or conclusions are contrary to the weight of the evidence. *Id.* § 404.970(b).

[52] *See id.* §§ 404.979, 416.1479. For a more complete assessment of the Appeals Council's functions and limitations, see *infra* Part VI.

[53] *See infra* Part VI. "Prior to effectuation" refers to the period after a decision is rendered on a particular claim, but prior to when that claim is paid.

[54] *See* 20 C.F.R. §§ 404.981, 416.1481 (2013).

agencies.[55] The Office of General Counsel ("OGC"), however, in a significant number of cases, declines to defend the agency decision in court and, instead seeks a consent order with the claimant to remand the case back to the agency.[56] Typical reasons include inadequate ALJ analysis of the material in the file, contradictions within the ALJ decision itself, or new evidence presented.[57] When faced with an ALJ (or Appeals Council) decision with such issues, the attorneys in the OGC may believe that the decision will not survive judicial review as written.[58]

When cases are litigated in federal court, the reviewing court must uphold the agency's findings if they are supported by "substantial evidence."[59] The court may affirm, modify, or remand the decision.[60] Courts only see appeals from denials of claims, so in that sense they do not consider a representative sampling of ALJ decisions. They reverse outright in under 3% of the cases.[61] They remand at a rate of close to 50%, and most of the remanded cases result in an eventual allowance of benefits.[62] In FY 2011, the percentage remanded dipped to 42%.[63]

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[55] DAVID E. LEWIS & JENNIFER L. SELIN, ACUS SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 115-16 & n.296 (1st ed. Dec. 2012); *see also* Center for the Study of Democratic Institutions, Sourcebook of United States executive Agencies, *ACUS Sourcebook Data*, http://www.vanderbilt.edu/csdi/sourcebook.php (last visited Feb. 15, 2013) (data coding SSA as an agency without independent litigating authority).
[56] There were 2229 voluntary requests for remands in FY 2011, 2419 in FY 2010, 2403 in FY 2008, 2496 in FY 2007, and 2763 in FY 2006. No information was available for FY 2009 due to a change in software. Those numbers represent roughly 15% of all cases appealed. *See* E-mail from Rainbow Forbes, Appeals Officer, Soc. Sec. Admin. Office of Appellate Operations, to Harold J. Krent, Dean and Professor of Law, IIT Chicago-Kent College of Law (Sept. 28, 2012) (on file with author) [hereinafter Forbes E-mail].
[57] Telephone Interview with Jeffrey C. Blair, Associate General Counsel, Soc. Sec. Admin. Office of the General Counsel (Sept. 14, 2012) [hereinafter Blair Interview].
[58] *Id.*
[59] 42 U.S.C. §§ 405(g), 1383(c)(3) (2013); *see also* 5 U.S.C. § 706(2)(E) (2013) (providing for substantial evidence review under the Admin. Procedure Act ("APA")).
[60] 42 U.S.C. §§ 405(g), 1383(c)(3) (2013).
[61] Astrue Testimony, *supra* note 9.
[62] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-331, SSA HAS TAKEN STEPS TO ADDRESS CONFLICTING COURT DECISIONS, BUT NEEDS TO MANAGE DATA BETTER ON THE INCREASING NUMBERS OF COURT REMANDS 3 (2007) [hereinafter SSA HAS TAKEN STEPS]; *see also Alternative Approaches*, *supra* note 11, at 741. With respect to district court remands, roughly 2/3 of the remanded claims are paid. *See*

Once disability is determined, claimants will continue receiving benefits unless a continuing disability review ("CDR") is performed, and the review shows a claimant is not considered disabled under the Act.[64] Congress has directed that SSA conduct CDRs at least every three years.[65] In implementing that mandate, SSA reviews disability cases periodically to see if the beneficiary is still disabled.[66] If SSA determines that an individual is no longer eligible for disability benefits, it provides a formal written notice to him or her explaining the basis for the decision.[67] Such determinations may be appealed, and the person is entitled to a hearing before an ALJ.[68]

II. DATA ANALYSIS

To better understand the variability in (and factors underlying) ALJ adjudication decisions, we conducted statistical analyses of SSA-provided data from its case processing system and other agency sources. A detailed discussion of our statistical studies is provided in full in the accompanying *Statistical Appendix – Analysis of Administrative Law Judge Dispositions and Allowance Rates (Fiscal Years 2009 – 2011)*. We summarize in this section our methodology and highlight some of our more significant empirical findings.

We analyzed data provided by SSA to assess the degree of variability and correlates of disposition outcomes. Data on ALJ dispositions and related hearing information were obtained from the Office of Disability Adjudication and Review

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SSA HAS TAKEN STEPS, *supra* note 62, at 16; *see also Alternative Approaches*, *supra* note 11, at 761; Martinez v. Astrue, 630 F.3d 693, 695-96 (7th Cir. 2011) (summarizing available data).
[63] *See* STATISTICAL APP., *supra* note 7, at 54 tbl. A-24; *see also* Forbes E-mail, *supra* note 56.
[64] 42 U.S.C. §§ 405(b)(2); 1383(k) (2013); 20 C.F.R. §§ 404.1594, 416.994 (2013).
[65] 42 U.S.C. §§ 421(i), 1382c(a)(3)(H) (2013).
[66] For brief summary of CDR process, see *infra* Part VIII; *see also* 42 U.S.C. §§ 421(i), 1382c(a)(3)(H)(ii)(I) (2013).
[67] 20 C.F.R. § 404.1597(a)-(b) (2013).
[68] *Id.* §§ 404.1597(b), 416.995.

("ODAR") case processing management system ("CPMS") management information data tables.[69] The data consisted of disposition and other case-related information relating all ALJs who had issued at least 200 dispositions in a fiscal year ("FY") between 2009 and 2011.[70] Monthly and yearly data on disposition frequency and allowance rates were available for each ALJ across each of the three studied fiscal years.[71] All data used in the analysis was coded by randomly generated pseudo-name in order to shield all personally identifiable information (*i.e.*, ALJ identities).[72] Further, no data on dispositions contained information about specific regions or hearing offices.[73]

The data set used for this analysis consisted of 1509 ALJs.[74] Data were available for 1129 ALJs in FY 2009, 1256 ALJs in FY 2010, and 1360 ALJs in FY 2011.[75] All together, the data set thus included a total of 3745 yearly data points.[76] Three separate data sets were created representing monthly, yearly, and overall average statistics for each ALJ.[77] The primary variables of interest for this analysis were the number of dispositions conducted in a time period (either monthly or yearly), and the proportion of allowances (either Fully Favorable or Partially Favorable).[78]

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[69] *See* STATISTICAL APP., *supra* note 7, at 1-5.
[70] Following the procedure used by OVERSIGHT OF ALJ WORKLOAD TRENDS, *supra* note 8, we excluded from our analyses ALJs who had an unusually low number of dispositions (less than 200 dispositions in a given fiscal year). *See* STATISTICAL APP., *supra* note 7, at 2. These low frequencies might be due to new hires, retirement, part-time work, or may be ALJs with other duties in addition to adjudicating cases. *Id.* One hundred fifty-two (9%) data points were removed due to low activity. *Id.*
[71] *See* STATISTICAL APP., *supra* note 7, at 2.
[72] *Id.* at 2.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 2-3.
[76] *Id.* at 8 tbl. A-2.
[77] *Id.* at 3-5.
[78] *See* STATISTICAL APP., *supra* note 7, at 3-4. Outcomes were initially classified into four categories: Fully Favorable, Partially Favorable, Unfavorable, and Dismissed. *Id.* at 3. Additional information on each of the disposition outcome categories can be found in Parts II.B.1 & III.B of the STATISTICAL APPENDIX.

Our first set of analyses was conducted to provide a description of the distribution of disposition and allowance rates. To represent typical values of each variable, we calculated the mean (or average) and the median. The median is the score at the midpoint of the distribution, such that half the distribution falls above and half below this value.[79]

Of particular important to this research is the degree of spread or variability in disposition and allowance rates – that is, the extent to which ALJs differ from one another on these variables. The variability of scores is indexed by the standard deviation ("SD"). The SD is calculated as the square root of the average squared distance from the mean, and can therefore be loosely interpreted as how far, on average, scores differ from the mean.[80]

In addition, we also report percentiles, which are useful for describing the upper and lower tails of the distribution. A percentile is the value of a variable below, which a certain percent of observations fall.[81] For example, the 1st percentile is the score that separates the lower 1% of the distribution from the upper 99%, while the 99th percentile is the score that separates the upper 1% from the lower 99%.

Correlation analyses were conducted to evaluate the relationship between disposition and allowance rates. The correlation coefficient is an index of the strength and direction of a relationship between two variables. The correlation coefficient can take on values from -1 to 1, with 0 indicating that variables are completely unrelated, values close to 1 indicating a strong positive relationship (higher scores on one variable are associated with higher scores on the other), and values close to -1 indicating a strong

[79] MORRIS H. DEGROOT & MARK J. SCHERVISH, PROBABILITY AND STATISTICS § 9.9 (4th ed., 2012) [hereinafter PROBABILITY AND STATISTICS].
[80] *See* PROBABILITY AND STATISTICS, *supra* note 79, § 4.3.
[81] *Id.* § 3.3.

negative relationship (higher scores on one variable are associated with lower scores on the other).[82]

Multiple regression analyses estimate how well a set of variables are able to predict a single outcome variable. The analysis produces a regression equation that predicts the outcome as a function of predictor variables.[83] The unique contribution of each predictor is reflected in the regression coefficient, which determines the weight given to a predictor in the equation.[84] The regression coefficient can be interpreted as the relationship between a predictor and the outcome, while controlling for all of the other variables in the model.[85] Like the correlation coefficient, regression coefficients of 0 indicate no relationship, and positive/negative coefficients reflect positive/negative relationships.[86]

Additionally, results from analyses of SSA data were evaluated for both statistical and practical significance. The statistical significance test produces a *p*-value, which is the probability of obtaining a result purely due to chance, if there were actually no relationship at all in the population. If the *p*-value is extremely small, the result is likely not due to chance, and the result is considered significant from a statistical perspective. For our analyses, results with $p<.01$ were considered statistically significant, which is a commonly used value to assess statistical significance.[87]

Finding a result to be statistically significant, however, does not necessarily connote *practical* significance. Practical significance refers to an assessment of whether

[82] *See* STATISTICAL APP., *supra* note 7, at 18.
[83] *Id.* at 33-34.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *E.g.*, PROBABILITY AND STATISTICS, *supra* note 79, at § 9.9.

an observed result is something that will have a practical impact. When sample size is very large (as with the ALJ adjudication data), some very minor effects will be statistically significant, even if their actual impact on adjudication outcomes is trivial. To assess practical significance, we describe the strength of relationships, and depict patterns in the data graphically so that the impact on adjudication outcomes can be readily understood.[88]

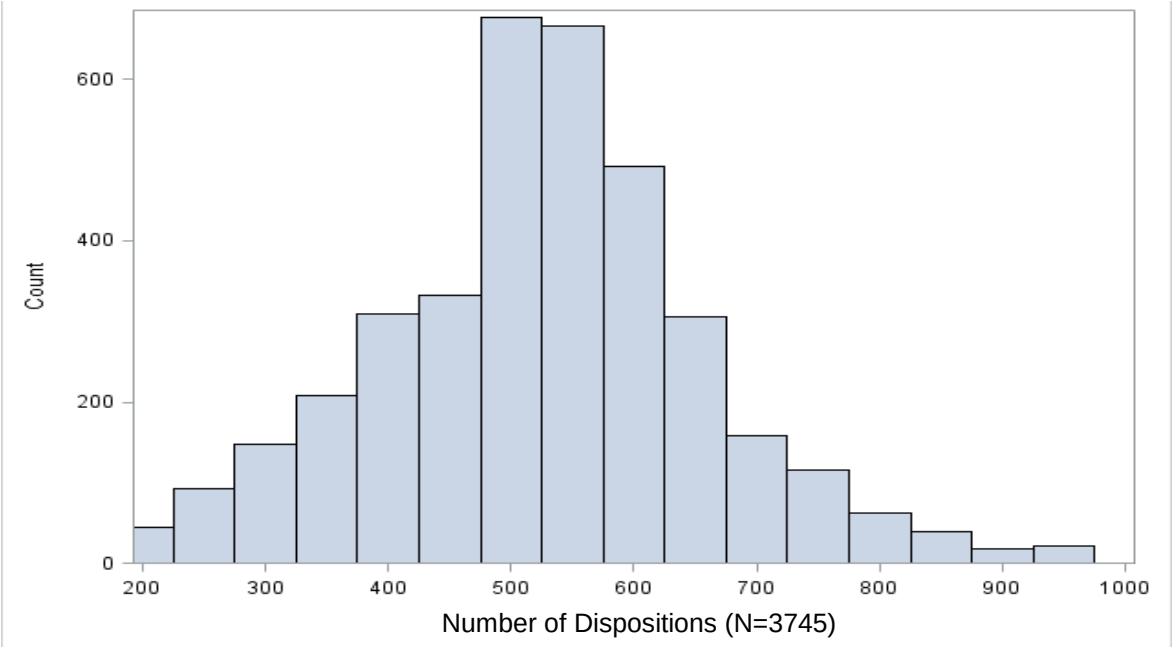
A. Summary of Statistical Analysis of ALJ Variances

1. Distribution of Disposition Frequencies

Over the three-year period studied, ALJs issued an average of 538.9 dispositions per year (Median=530, SD=180.5).[89] The majority of ALJs (67%) met the goal of 500 or more dispositions per year. Yearly disposition frequencies showed considerably variability, however, as evidenced by the large SD of 180.5. As depicted in Figure 1, there was a wide range of yearly disposition frequencies. Ninety-five percent of ALJs disposed of between 255 and 878 claims per year, therefore ranging from about half of the yearly goal to 75% over the goal. A small number of ALJs had very high disposition frequencies. One percent of ALJs had annual disposition frequencies above 1079, and one ALJ issued 3620 dispositions in a single year.

[88] *Id.*
[89] Unless otherwise noted, all figures and statistical analyses in this section can be found in Part II.A.1 of the STATISTICAL APPENDIX.

Figure 1: Distribution of Yearly Number of Dispositions



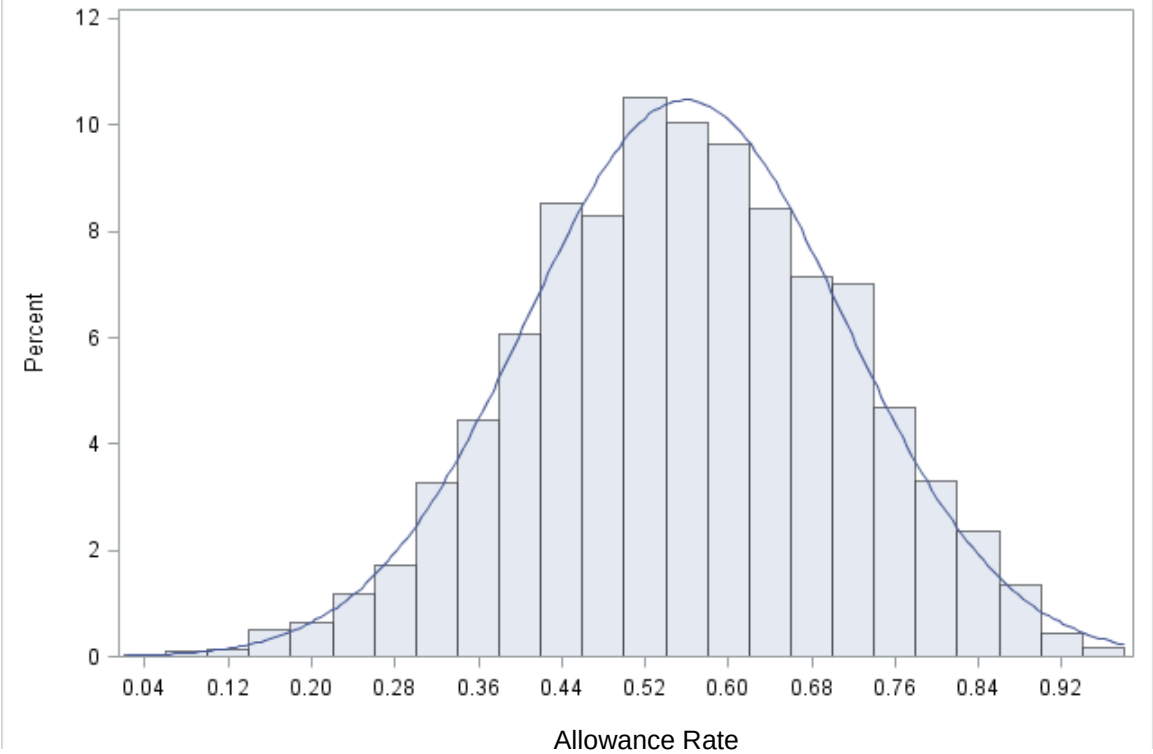
2. Distribution of Allowance Rates

On average, the annual ALJ allowance rate was 56% for the three studied fiscal years.[90] There was, however, significant variation in allowance rates across ALJs, as depicted in Figure 2 and suggested by the SD of 15% in allowances rates. Indeed, 95% of the allowance rates fell between 26% and 85%.[91] ALJs at the lower end of the distribution thus had allowance rates less than half of the average, while those at the top of the distribution had allowance rates over 50% higher than the average. The lowest and highest allowance rates (4% and 98%, respectively) very nearly spanned the full range of possible values.

[90] Unless otherwise noted, all figures and statistical analyses in this section can be found in Part II.B.1 of the STATISTICAL APPENDIX.

[91] A similar range was found when considering only Fully Favorable dispositions, where 95% of the rates were between 20% and 82%. *See* STATISTICAL APP., *supra* note 7, at 13.

Figure 2: Distribution of Yearly Allowance Rate (Fully or Partially Favorable Decisions)



3. Identifying Outliers

a) Methodology for Identifying Outliers

From a purely statistical perspective, an outlier is defined as a score that is atypical given the overall distribution.[92] This approach merely identifies outliers and does not provide any information that might explain why a score is atypical.[93] This kind of outlier is thus an observation that warrants further attention to determine why the unusual event has occurred.[94]

[92] *See* STATISTICAL APP., *supra* note 7, at 19.
[93] *Id.*
[94] *Id.*

Outliers are defined relative to an assumed distribution of scores.[95] In the context of social security disability claims, some variability in outcomes across adjudication of claims is to be expected due to the random assignment of cases to ALJs.[96] Each claimant is different, as is his or her individual case. And similar types of cases may be distributed somewhat unevenly across ALJs purely as a matter of chance. Once the range of expected variation due to chance has been specified, outliers can be defined as scores that are outside of these bounds.[97]

In order to define the expected range of scores, outliers can be defined relative to a normal distribution.[98] In many areas of research, variables are found to have a "normal" distribution, where scores are distributed symmetrically around the mean, and the density of scores decreases with distance from the mean, forming a bell-shaped curve.[99] An example of a normal distribution is depicted by the smooth curve in Figure 2, which shows that allowance rates had an approximately normal distribution.

If a distribution is normal, nearly all scores will fall within 2 SD of the mean.[100] Only about 5% of scores will be more than 2 SD from the mean (with 2.5% at the high end of the distribution, and 2.5% at the low end), and only 1% of scores will be more than 3 SD from the mean.[101] Because only a small fraction of observations will naturally

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[95] *Id.* at 20.
[96] *See* 5 U.S.C. § 3105 (2013) ("Administrative law judges shall be assigned to cases in rotation so far as practicable."); *see also* Soc. Sec. Admin., HALLEX I-2-0-2-Hearing Before an Admin. Law Judge—General (Sept. 28, 2005), *available at* http://www.ssa. gov/OP_Home/hallex/I-02/I-2-0-2.html (noting that Hearing Office Chief ALJs ("HOCALJs") "assign ALJs to hold hearings, issue decisions or orders, and take other appropriate action to resolve disputed issues"); Soc. Sec. Admin., HALLEX I-2-1-55-Assignment of Service Area Cases to Admin. Law Judges (Feb. 12, 2009), *available at* http:// www.ssa. gov/OP_ Home/hallex/I-02/I-2-1-55.html (noting "[s]pecial [s]ituations [w]hich [r]equire a [c]hange in the [o]rder in [w]hich [c]ases are [a]ssigned").
[97] *See* STATISTICAL APP., *supra* note 7, at 19-20.
[98] *Id.* at 20.
[99] *Id.*
[100] *Id.*
[101] *Id.*

fall outside a 2 SD range, scores outside these bounds are not likely to have occurred due to chance, and are therefore likely to have been produced by some process that differs from the rest of the distribution.[102]

With any rule for identifying outliers, there is a risk of false positive and false negative decisions.[103] A false positive would occur if an observation is classified as an outlier when it occurred simply due to chance.[104] Identifying outliers using a 2 SD rule will have a 5% false positive rate, because 5% of scores in a normal distribution are expected to fall outside 2 SD from the mean.[105] Setting a more stringent criterion will tend to reduce the false positive error rate.[106]

A false negative error would occur if an observation falls within the 2 SD interval, yet was actually generated by a different distribution.[107] That is, a hypothetical ALJ who is applying overly lenient standards might nevertheless still produce an allowance rate within the 2 SD bounds, simply due to chance.[108] The probability of a false negative error cannot be known precisely in the context of ALJ disposition and allowance rates, but as the criterion for identifying an outlier becomes more stringent, the probability of a false negative error increases.[109]

The decision of where to put the cutoff for defining outliers depends on the desired balance of false positive and false negative errors.[110] Setting the cutoff too low

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[102] *Id.*
[103] *Id.* at 20-21. The terms "false positive" and "false negative" are used here to designate statistical errors in the identifying of outlier data points, and have nothing to do with the merits (or lack thereof) of the underlying disability determinations. *Id.*
[104] STATISTICAL APP., *supra* note 7, at 20.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.* at 21.

will flag many observations as outliers when they are simply due to chance; while setting the cutoff too high will fail to identify many true outliers.[111] It is common for statisticians to define outliers as observations falling 2 or 3 SD above or below the mean.[112]

b) Outliers in ALJ Disposition and Allowance Rates

Establishing a cutoff for ALJ adjudication data is complicated by changes in the distribution of disposition and allowance rates over time.[113] Although the average number of dispositions was relatively stable from FY 2009 to FY 2011, the variability in ALJ disposition rates has declined.[114] Mean allowance rates declined over the three years of the study, suggesting that standards for defining an outlier should be tied to yearly statistics.[115] Table 1 provides the cutoffs corresponding to 2 and 3 SD above and below the mean for yearly disposition frequency and allowance rates. Table 1 also includes percentile values, which do not rely on an assumed shape of the distribution.[116]

Applying a 2 SD rule to allowance rates would classify outliers as all ALJs with allowance rates below 23% (approximately 37, or 3% ALJs in FY 2011) and ALJs with allowance rates above 82% (approximately 30, or 2% ALJs).[117] Similarly, 3% of ALJs (approximately 38) had disposition frequencies over 878.[118]

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[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] Because the data here did not exactly reflect a normal distribution, the 2 or 3 SD rules need to be applied with caution. *See* STATISTICAL APP., *supra* note 7, at 21. For the number of dispositions, the presence of large positive outliers will slightly inflate both the mean and the SD, so that the cutoff established using these rules may be too high. *Id.* Further, because the allowance rate is a percentage, it is constrained by a maximum value of 100%, which may cause compression of values near the upper limit. *Id.*
[117] *Id.* at 22.
[118] *Id.*

Table 1: Extreme Values for Number of Dispositions and Allowance Rates (FY 2011)

Fiscal Year 2011	Mean	SD	3 SD Below Mean	2 SD Below Mean	2 SD Above Mean	3 SD Above Mean	1st %tile	5th %tile	95th %tile	99th %tile
Number of Dispositions	537.5	170.1	-	-	878	1048	-	-	780	959
Allowance Rate	53%	15%	9%	23%	82%	96%	18%	29%	77%	88%

(Note: Because data from ALJs with fewer than 200 dispositions were excluded from the analysis, it was not possible to use the distribution to identify outliers corresponding to low number of dispositions.)

Another way to identify outliers is to evaluate the consistency of outcomes over time.[119] An ALJ who is in the top or bottom 1% one year might be the result of chance variation. However, if the same individual appears in the top or bottom 1% in multiple years, this is more likely to be due to something unique to that individual.[120] Therefore, special attention should be paid to ALJs who have consistent extreme scores in multiple years.[121] Table 2 reports the number of ALJs appearing for multiple years in the top and bottom 1% of the disposition and allowance rates.

Table 2: Number of ALJs with Multiple Years in the Top and Bottom 1% of the Disposition Frequency and Allowance Rate Distributions (FY 2009 – 2011)

Years in Top or Bottom 1%	Number of ALJs With Disposition Frequencies in Top 1%	Number of ALJs With Allowance Rates (Full + Partially Favorable) in Top/Bottom 1%	
		Bottom 1%	Top 1%
At least 1 year	22	24	25
At least 2 years	10	10	10
All 3 years	6	5	3

[119] *Id.*
[120] *Id.*
[121] *Id.*

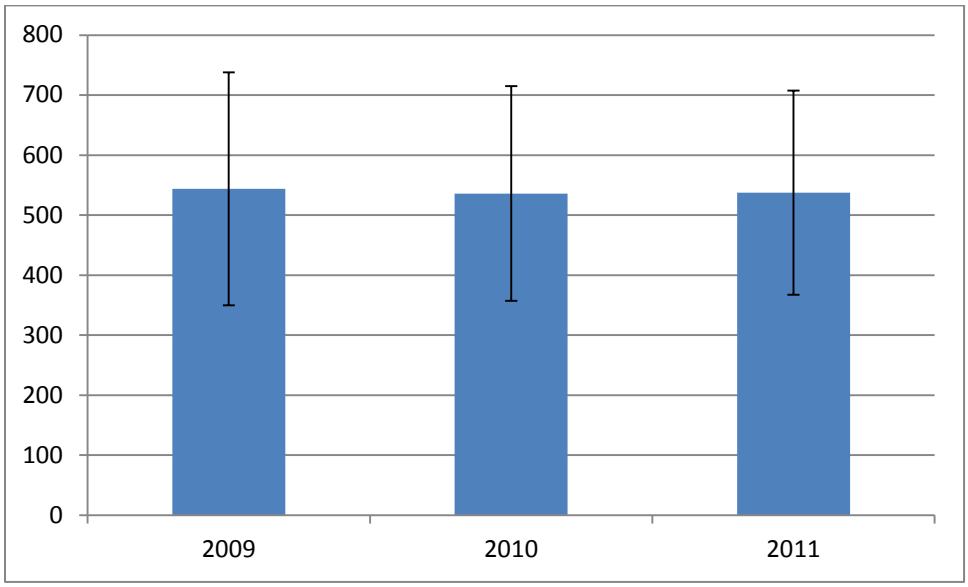
Ideally, outliers would be defined relative to a predictive model that accounts for important characteristics of the portfolio of cases reviewed by an ALJ, and other relevant variables.[122] The *Statistical Appendix* describes an initial attempt to identify case characteristics that correlate with adjudication outcomes, but additional work is needed to build a model that incorporates all relevant factors. [123] Therefore, we did not attempt herein to account for such factors in our definition of outliers.

4. Changes in Disposition Outcomes Over Time

The data indicate that variability in disposition rates is becoming less extreme over time, while average dispositions have remained relatively constant.[124] The average number of dispositions has not changed substantially across years.[125] As shown in Figure 3, ALJs issued an average of 543.8 dispositions in FY 2009, 535.9 in FY 2010, and 537.5 in FY 2011. However, the variability in the number of dispositions decreased over the years SD=194.1 in FY 2009, SD=178.8 in FY 2010, and SD=170.1 in FY 2011.[126] The spread of disposition frequencies in 2011 was over 10% smaller than in 2009. Thus, while there still exist large differences in ALJ productivity, with some ALJs issuing substantially more dispositions than others, these discrepancies have been on the decline.

[122] *Id.* at 23.
[123] *Id.* at 23; *see also id.* Parts III & IV.
[124] *Id.* at 9.
[125] *Id.*
[126] *Id.* The SD in FY 2009 was significantly greater than in FY 2010, $F(1128, 1255)=1.18$, $p=.002$) and greater than in FY 2011, $F(1128, 1359)=1.30$, $p<.001$. *Id.* The difference between FY 2010 and FY 2011 was not statistically significant, $F(1255, 1359)=1.11$, $p=.04$. *Id.*

Figure 3: Average Yearly Disposition Frequency Over Time



(Note: Error bars indicate 1 SD above and below the average.)

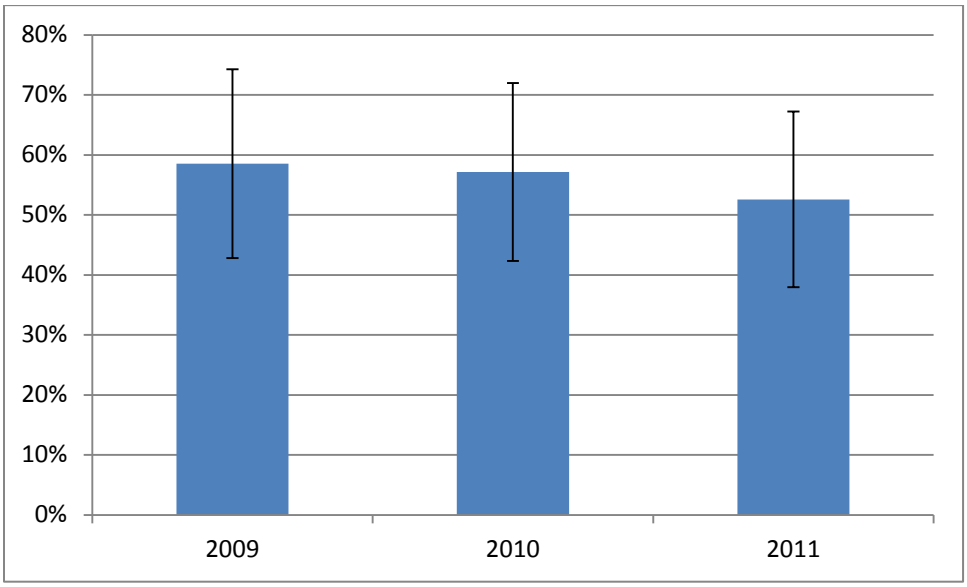
Allowance rates have been steadily declining since FY 2009, as shown in Figure 4. The mean allowance rate dropped from 59% in FY 2009 to 58% in FY 2010 and 53% in FY 2011.[127] More recent data suggest that this trend is continuing, with an allowance rate of 48% in FY 2012.[128] The variance in allowance rates (*i.e.*, differences between ALJs in allowance rates) has been relatively stable over time.[129] This decline occurred across the entire distribution of allowance rates, although there tended to be less change at the lower end of the distribution.[130] Table 3, below, demonstrates the change at three points of the distribution. For the median and 90th percentile, allowance rates dropped

[127] The allowance rates reported here only reflect decisions by ALJs. If favorable decisions by senior attorneys are included in the calculation, the overall allowance rate was 61% in FY 2009, 61% in FY 2010, and 56% in FY 2011. *See* STATISTICAL APP., *supra* note 7, at 14; *see also infra* fig. 4.
[128] Including favorable decisions by senior attorneys, the overall allowance rate was 50% in FY 2012. Data.gov, ALJ Disposition Data, https://explore.data.gov/Social-Insurance-and-Human-Services/ALJ-Disposition-Data/zdyy-hq2m (last visited Feb. 21, 2013).
[129] *See* STATISTICAL APP., *supra* note 7, at 14-15.
[130] *Id.* at 15.

by 2-3% from FY 2009 to FY 2010 and by 5% from FY 2010 to FY 2011. At the lower end of the distribution, there was no change in the 10th percentile between FY 2009 and FY 2010, and a change of 4% from FY 2010 to FY 2011.

Corresponding to the drop in the mean allowance rate, the number of ALJs with extremely high rates has been declining. As shown in Table 4, below, the percentage of ALJs with allowance rates over 80% has dropped by half, from 9% in FY 2009 to 4% in FY 2011. At the other end of the distribution, the percentage of ALJs with extremely low allowance rates has been relatively stable (*i.e.*, 5% in FY 2009 and 6% in FY 2011).

Figure 4: Average Allowance Rate Over Time



(Note: Error bars indicate 1 SD above and below the average.)

Table 3: Changes in Allowance Rates (2009 – 2011)

Percentile	2009	2010	2011
10th %tile	38%	38%	34%
Median	59%	57%	52%
90th %tile	79%	76%	72%

Table 4: Annual Distribution of ALJs with Allowance Rates Substantially Above and Below the Mean

	Percent of ALJs below 20% Allowance Rate	Percent of ALJs below 30% Allowance Rate	Percent of ALJs above 70% Allowance Rate	Percent of ALJs above 80% Allowance Rate
2009	1%	5%	25%	9%
2010	1%	4%	21%	7%
2011	2%	6%	13%	4%

B. Correlation Between High Number of Dispositions and Allowances

The SSA Office of the Inspector General ("IG") has reported that some ALJs who feel pressure to meet yearly disposition goals may decide more cases in favor of claimants.[131] Several analyses were conducted to test whether higher disposition rates were associated with higher allowance rates. Overall, there was little correlation between disposition and allowance rates, although some relationships were found at the extremes.[132] ALJs with extremely high productivity in multiple years tended to have higher allowance rates than less extreme ALJs.[133]

First, we examined the correlation between the allowance rate for each ALJ and the average number of dispositions per year. We found a modest but statistically significant correlation.[134] Although significant, this correlation is extremely small (.15).[135] A correlation of this level implies that the number of dispositions can account for about 2% of the variance in allowance rates.[136] Thus, when considering the entire

[131] OVERSIGHT OF ALJ WORKLOAD TRENDS, *supra* note 8, at 7.
[132] *See* STATISTICAL APP., *supra* note 7, at 23-25, 29.
[133] *Id.* at 23-25.
[134] *Id.* at 28.
[135] *Id.*
[136] *Id.*

distribution of ALJs, the data do not support the general proposition that ALJs achieve higher productivity by allowing more claims.

Although we did not find a general relationship between disposition and allowance rates, it may be that they are related at extreme levels of the two variables. If those ALJs with extremely high disposition rates also tend to have high allowance rates, this would support the idea that they may be issuing allowances to claimants to clear backlogs, meet disposition goals, or make themselves appear more productive.

The top 1% of yearly disposition frequencies was defined as those with 1079 or more dispositions in a fiscal year.[137] This consisted of 22 ALJs, six of whom were outliers in all three years, four of whom were outliers in two years, and 12 were outliers in a single year.[138]

Comparison of the top 1% to other ALJs indicates that these outliers issued fewer Partially Favorable (2% vs. 5%), fewer Unfavorable (16% vs. 29%), and more Dismissed dispositions (23% vs. 15%).[139] The difference in Fully Favorable rates (58% vs. 50%) was not statistically significant.[140] Further, there was a trend of higher Fully Favorable rates among those with 2 or 3 years on the top 1% (65% Fully Favorable) compared to those in the top 1% for 0 or 1 year (50% Fully Favorable).[141]

Second, we also explored whether dispositions differed for outliers identified in terms of allowance rates. For this analysis, we studied ALJs who had atypically high or low allowance rates. The top 1% of allowance rates (those issuing Fully or Partially Favorable decisions in over 89% of cases) consisted of 25 ALJs, 15 with 1 year in the top

[137] *Id.* at 7.
[138] *Id.* at 23 tbl. A-8.
[139] *Id.* at 24.
[140] *Id.*
[141] *Id.*

1%, seven with 2 years in the top 1%, and three with 3 years in the top 1%.[142] Groups defined by number of years in the top 1% of allowance rates differed significantly in the number of dispositions issued. ALJs with 3 years of high allowance rates tended to issue a high number of dispositions per year (M=866, SD=360), as did ALJs with 2 years of high allowance rates (M=724, SD=338). Those with a single year in the top 1% issued a similar number of dispositions (M=557, SD=220) to those who were never in the top 1% (M=537, SD=177).

The bottom 1% of allowance rates (those under 19%) consisted of 24 ALJs, 14 with one year in the bottom 1%, five with 2 years in the bottom 1%, and five with 3 years in the bottom 1%.[143] There was no consistent pattern in the number of dispositions issued. The number of dispositions tended to be below average for ALJs with one year in the bottom 1% (M=405, SD=158) and those with 3 years in the bottom 1% (M=417, SD=87).[144] However, those with 2 years in the bottom 1% (M=530, SD=81) were similar to those who were never in the bottom 1% (M=541, SD=181).[145]

"Hurry up" Dispositions. The distribution of yearly disposition frequency suggested a tendency of individuals close to the goal of 500 dispositions per year to put in extra effort to reach that goal.[146] That is, the distribution displayed a lower number of dispositions in the range of 450-499 than would be expected from a normal distribution, and an excess of dispositions in the range of 500-549.[147] In this section, we examine

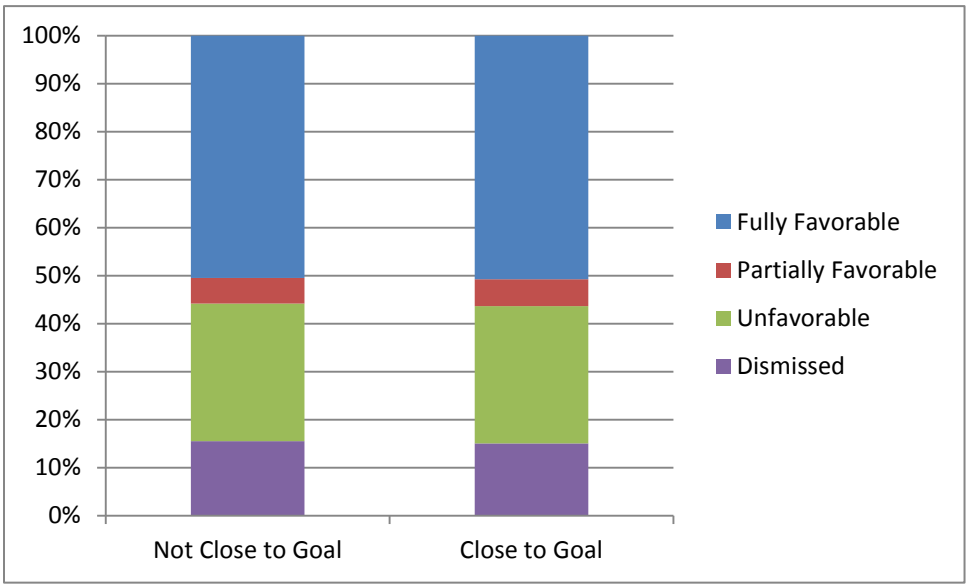
[142] *Id.*
[143] *Id*. at 24-25.
[144] *Id*. at 25.
[145] *Id*.
[146] *Id*. at 10.
[147] *Id.*

whether this pattern was produced by an increase in activity toward the end of the fiscal year, and what impact this increased activity had on allowance rates.

As expected, being close to the goal was found to have an impact on ALJ activity in September. ALJs who were just below the yearly goal (450-499 dispositions) tended to have a lower number of dispositions per month than those just above the goal (500-549 dispositions), except for the month of September, where there was no difference between the two groups.[148] Thus, it appears that individuals below the goal were increasing disposition output in September.

An analysis was conducted to determine whether this push to meet the goal led to changes in disposition outcomes. The data did not support the hypothesis that ALJs would issue more allowances if they were near the goal. Those near the goal (450-549 dispositions per year) did not show a different pattern of allowance rates, when compared to other ALJs (*see* Figure 5).

Figure 5: Disposition Outcome Rates for ALJs Close to Yearly Disposition Goal



[148] *Id.* at 11. The analysis of monthly disposition frequencies is described in greater detail in Part II.A.3 of the STATISTICAL APPENDIX.

To further explore the year-end rush, we examined ALJs who were just over the yearly goal (500-549 dispositions per year) and who had high activity in September (greater than 1 SD above the September average number of dispositions). These ALJs had September allowance rates that were slightly lower than in other months (54% in September, 58% in other months).[149] However, a similar differential was observed among other ALJs (55% in September, 57% in other months).[150] Thus, the data provide no evidence that allowance rates were increasing at year-end among ALJs who were hurrying to meet the yearly goal.

C. Difference Between Video and Non-Video Hearings

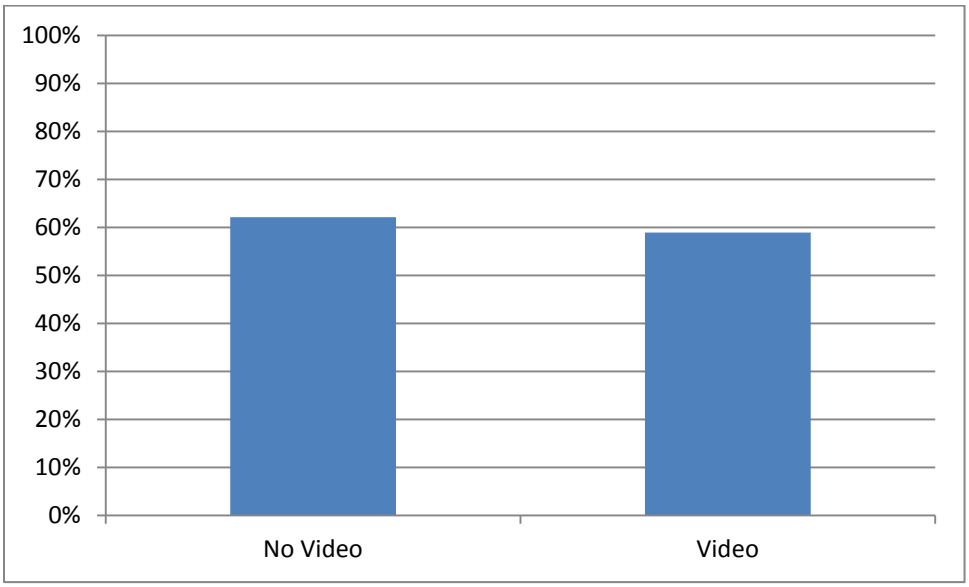
Analyses were conducted to determine whether use of video hearings was correlated with adjudication frequencies and allowance rates. First, to investigate whether use of video hearings was associated with productivity, we calculated the proportion of hearings each ALJ conducted by video, and correlated this with the average number of dispositions per year. We found a correlation coefficient of .03, indicating virtually no relationship.[151] Thus, ALJs who conducted more hearings by video issued neither more nor fewer dispositions than those who used video hearings less often.

A second analysis examined the relationship between use of video hearings and allowance rates. Our analysis showed a small, but statistically significant impact. On average, video hearings had allowance rates about 3% lower than non-video hearings (*see* Figure 6).[152] Although the average effect of video hearing was small, some ALJs showed

[149] *Id.* at 13.
[150] *Id.*
[151] *Id.* at 41 tbl. A-16.
[152] *See also id.* at fig. A-10.

a larger effect.[153] While the majority of ALJs (80%) showed lower allowance rates, 20% showed higher allowance rates on video hearings.[154]

Figure 6: Predicted Allowance Rate for Video Hearings (2011)



III. IMPACT OF INCREASED CASELOAD ON ALJ ALLOWANCE RATES

There is no question but that SSA's increased emphasis on reducing the backlog has yielded results. As Commissioner Astrue summarized to Congress, the average waiting time peaked in 2008 at 532 days, and that has been pared down to 350 days.[155] Much of the success can be traced to ALJs' mounting workload: ALJs in the past ten years have increased their average number of dispositions from 350 to 550 a year.[156] Commissioner Astrue also attributed the success to "expanded automation tools" and to "standardizing business practices."[157] In addition, more ALJs have been hired.[158] The

[153] *Id.*
[154] *Id.*
[155] Astrue Testimony, *supra* note 9.
[156] Astrue Testimony, *supra* note 9.
[157] *Id.*
[158] *Id.*

reduction is impressive and, at first blush, the decrease in backlog combined with falling remand rates appears to be an unadorned success.

With the disclosures of impropriety in the West Virginia SSA Office, however, journalists and others suggested a link between ALJs with a high number of dispositions and the percentage of claims allowed.[159] For instance, the *Wall Street Journal's* Damian Paletta reported on Judge Daugherty who allowed benefits in 1280 of 1284 decisions in 2010 and in 1001 of 1003 cases the next year before he was put on leave.[160] The *Pittsburgh Tribune-Review's* Adam Smeltz compared the allowance rate of one ALJ in Western Pennsylvania who allowed benefits in 78% of the cases as opposed to a colleague who allowed claims in 15% of cases.[161]

SSA's principal priority has been to reduce the backlog.[162] One way for ALJs to generate large numbers of dispositions is to allow a higher percentage of claims, because such decisions need not be legally defensible in the absence of an appeal or own motion review by the Appeals Council. Indeed, the Office of Appellate Operations ("OAO") has documented that decisions that allow benefits are shorter in length.[163] Thus, the fallout from management's focus on reducing the backlog may be an excessive allowance rate, at least among those resolving a great many claims.

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[159] Paletta, *supra* note 2.

[160] Judge Daugherty is no longer employed as an ALJ at SSA. *See* Wsaz.com, *The man in the middle of a Social Security office controversy has retired*, July 19, 2011), http://www.wsaz.com/news/headlines/Local_ Social_ Security_Judge_Under_Scrutiny_122259399.html (last visited March 1, 2013).

[161] Smeltz, *supra* note 2.

[162] Astrue Testimony, *supra* note 9.

[163] Soc. Sec. Admin. Office of Appellate Operations Executive Director's Broadcast, at 4 (Jan. 20, 2012) (on file with author) [hereinafter Exec. Dir. Jan. 2012]. Of course, the mere fact that a Fully or Partially Favorable decision is shorter in length does not necessarily mean that it does not comport with SSA policy or other legal requirements for allowance of Social Security disability claims. Nonetheless, as we discuss later, *see infra* Part VIII, spartan decisions allowing claims make CDR more difficult.

In response to a congressional inquiry about the variance in ALJ allowance rates, the SSA IG conducted an investigation into ALJs with disposition and allowance rates well above and below the mean.[164] Of relevance here, the IG reported that some "ALJs mentioned that peers who felt pressured to meet the 500 to 700 disposition benchmark may have allowed more cases because allowances are easier to process than denials."[165] The IG also found a correlation between high disposition and allowance rates.[166]

In response to that publicity, management recently limited the assignment of new cases to 960 cases annually.[167] Overall, the allowance rate has gone down the last four years, from 61% in FY 2009 to 50% in FY 2012.[168] The percentage remanded from the courts has also decreased,[169] suggesting improvements in ALJ decisionmaking.

Our data confirm that the link between dispositions and allowance rate is weakening, perhaps, in part, because of adverse publicity. We found that higher disposition rates were not substantially correlated with higher grant rates.[170] Caution is needed, however, before any consideration is given to increasing the current production goals. First, our data demonstrate a continuing link between high dispositions and

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[164] OVERSIGHT OF ALJ WORKLOAD TRENDS, *supra* note 8, at 1.
[165] *Id.* at 7.
[166] *See id.* at 8-9.
[167] *See* E-mail from Maren Weight, Appeals Officer, Soc. Sec. Admin. Office of Appellate Operations, to Amber Williams, Att'y Advisor, Admin. Conf. of the U.S. (Mar. 1, 2013) (on file with ACUS) (noting the new number limit) [hereinafter Weight E-mail]; *see also Hearing Before the Senate Comm. on Homeland Security and Governmental Affairs*, 112th Cong. (2012) (statement of Judge Patricia Jonas, Executive Director, Soc. Sec. Admin. Office of Appellate Operations, Office of Disability Adjudication and Review), *available at* http://www.ssa.gov/legislation/ testimony_091312.html (noting previous number limit).
[168] *See supra* note 128 and accompanying text (discussing the more recent 2012-13 allowance rate figure). Additional analyses of allowance rates from FY 2009 to FY 2011 are reported in the Part II.B of the STATISTICAL APPENDIX.
[169] Forty-eight percent of cases filed in the federal courts were remanded in FY 2009 (based on six months of data), 47% were remanded in FY 2010, and 42% were remanded in FY 2011. *Id.* at 54 tbl. A-25. These percentages were calculated using the number of cases filed and remands issued by the courts in a given fiscal year. *Id.*at 53. Because some cases may be filed and decided in different years, these percentages are only approximate. *Id.* Additional analysis of federal court remand rates can be found in Part II.B of the STATISTICAL APPENDIX.
[170] *See* STATISTICAL APP., *supra* note 7, at 23-25.

allowance rates for outliers.[171] The data culled suggest that ALJs with the largest number of dispositions tended to issue fewer Partially Favorable decisions, fewer Unfavorable decisions, and more Dismissals.[172] Further, recurrent outliers (those who were in the top 1% for more than one year) tended to issue more Fully Favorable decisions than other ALJs.[173] Given that writing allowance decisions typically takes less time than denials, the correlation is logical. As the IG report earlier noted, increased productivity at the outlier level has resulted in higher allowance rates for this group of ALJs.[174] And a greater number of allowances, if improvidently granted, results in substantial additional cost to the taxpayers.

Second, the diminishing correlation does not itself necessarily suggest that the quality of ALJ decisionmaking has improved. In another report, the IG noted that the Office of Quality Performance ("OQP") – a component within SSA that issues advice and recommendations regarding quality to other SSA components – determined that there were errors in roughly 16% of cases allowing benefits that it randomly selected for review.[175] OAO's experience with own motion review revealed that "[s]horter decisions tend to mean briefer descriptions and evaluation of the medical evidence and the RFC. 'Sometimes you have to reconstruct the rest of the decision to figure out the basis for the ALJ's finding of the RFC before you can ask whether it is supported by substantial

[171] *Id.* at 23.
[172] *Id.* at 23.
[173] *Id.* at 24.
[174] OVERSIGHT OF ALJ WORKLOAD TRENDS, *supra* note 8, at 8-9.
[175] SOC. SEC. ADMIN. OFFICE OF THE INSPECTOR GENERAL, CONGRESSIONAL RESPONSE REPORT: THE SOCIAL SECURITY ADMINISTRATION'S REVIEW OF ADMIN. LAW JUDGES' DECISIONS, A-07-12-21234, at 9-10 (Mar. 2012) [hereinafter REVIEW OF ALJS' DECISIONS] (reporting results of a post-effectuation disability case review of a random sampling of 722 allowances, as well as 722 denials); *see also* SOC. SEC. ADMIN. ORGANIZATIONAL MANUAL, at Subchapter TK (Soc. Sec. Admin.), *available at* http://www.socialsecurity.gov/org/orgdcqp.htm.

evidence.'"[176] In the view of many ALJs, they simply do not have the time to evaluate each piece of evidence cogently.[177] As a result, it may be that not only are payments made to claimants who are not disabled, but payments also are denied to claimants who are deserving.

Third, some believe that the increased disposition goal has increased tension between SSA and the ALJ corps.[178] Some ALJs perceive that SSA's goal is to meet the target above all considerations, including quality and accuracy.[179] According to a relatively recent grievance by the Association of Administrative Law Judges ("AALJ"), the union of SSA ALJs, agency pressure on ALJs to reach the target has included "berating judges who fail to reach 500 cases, and threatening discipline or adverse consequences for judges who do not get to 500 cases. . . . Agency pressure has led to management insensitivity, overwork, and stress-induced health issues."[180] The grievance alleged that, hearing office chief ALJs ("HOCALJs") "have hoarded dismissals, and monopolized the best decision writers to avoid giving detailed instructions or doing extensive editing."[181] In the words of one ALJ, "resources follow production."[182] Some ALJs also relayed to the IG their concern that the primacy of the disposition goal has

[176] Exec. Dir. Jan. 2012, *supra* note 163, at 4.
[177] *See* discussion *infra* at 34 & n.182.
[178] Wolfe, *supra* note 40, at 409-10. It is beyond the scope of this study to ascertain the propriety of any particular disposition goal. Rather, this report attempts to assess the impact of SSA's current disposition goal and traces steps in Part IV to ensure better quality decisionmaking.
[179] Interview with Hon. J.E. Sullivan, Admin. Law Judge, formerly with Soc. Sec. Admin. (Feb. 13, 2013) [hereinafter Sullivan Interview]; Survey by Assoc. of Admin. Law Judges (Feb./Mar. 2012) [hereinafter AALJ Survey] (copy on file with author).
[180] Post-Hearing Brief of Grievant Gilbert at 5, Gilbert v. Soc. Sec. Admin., FMCS#12109-00200-8 (Dec. 17, 2012) [hereinafter Post-Hearing Brief]. The FMCS arbitrator subsequently denied the *Gilbert* grievance, finding that the agency's case disposition goal violated neither the APA nor the collective bargaining agreement. *See* Decision of Arbitrator Rod Falor (Jan. 6, 2013). To date, ALJs challenging the 500 - 700 annual disposition goal on legal grounds have been unsuccessful. *E.g.*, SSA v. Shapiro, No. CB-7521-11-0024-T-1, 2012 MSPB LEXIS 6123 (Oct. 18, 2012).
[181] Post-Hearing Brief, *supra* note 180, at 5.
[182] Interview with Hon. Mike Logan, Admin. Law Judge, Soc. Sec. Admin. (Feb. 11, 2013) [hereinafter Logan Interview].

caused a number of HOCALJs to satisfy their own goals principally by assigning the simplest cases to themselves – those that require no hearings.[183]

These perceptions – irrespective of the reality – were also reflected in an anonymous survey distributed by the AALJ. Although the union may not be an unbiased observer, the results from the survey – which earlier had been shared with SSA – document a widespread belief that ODAR management is concerned only about numbers as opposed to quality.[184] Frequent comments were the lack of an equitable distribution of cases among ALJs (chief ALJs and favored ALJs received easier cases), the lack of a rotation of the best decisionwriters among ALJs, insufficient time to review the record, as well as the impossibility of writing all 500-700 decisions in a cogent manner.[185]

***Recommendation 1 - Annual ALJ Disposition Goal*:** Increased productivity successfully has helped reduce the backlog of appeals, but that reduction has come with a cost, both to the coherency of ALJ decisionmaking and to the relationship between ODAR and many ALJs.[186] Accordingly, we recommend that ODAR not increase the target for the foreseeable future and signal to ALJs that quality remains a central goal of the system.

IV. CASE MANAGEMENT

SSA has attempted to streamline disability adjudication in a number of ways. First, it has removed responsibility from ALJs to write decisions and to manage the

[183] OVERSIGHT OF ALJ WORKLOAD TRENDS, *supra* note 8, at 10-11.
[184] *See* AALJ Survey, *supra* note 179. About 370 ALJs in the SSA ALJ corps provided survey responses. *Id.*
[185] *Id.* at 13-19, 49-71. In terms of overall survey results, it bears noting that the majority of respondents (72.6%) found it "not difficult at all" or only "somewhat difficult" to reach 500 dispositions or more in one year; the remaining 27.4% of respondents found this disposition goal "very difficult." *Id.* at 4. Text-based comments provided by survey respondents noted the concerns listed above. *See id.* at 13-19, 31-45, 49-71.
[186] To alleviate pressure on ALJs, we suggest the changes in Part IV *infra*.

caseload, reserving for them the principal duty of deciding cases.[187] Clerks or attorney advisors are assigned to work up files, determine if key evidence is missing, and schedule hearings.[188] Second, SSA has mandated technological reforms in an effort to expedite the process. The file is now electronic, and the agency has constructed an electronic template, called Findings Integrated Template, to assist ALJs and decisionwriters in handling cases.[189] As we will discuss, the agency also has encouraged the utilization of video hearings.[190]

The agency, however, has not fully considered deploying the resources of one of the key participants in the process: the claimant's representative. Claimants are represented in roughly 80% of the cases and attorney representatives stand to gain up to 20% from any award (up to $6000).[191] Unlike in most court systems, SSA's disability adjudication process is non-adversarial.[192] SSA has not prescribed the records that the claimants' representative must furnish to the ALJs and the format that they should be in.[193] Elsewhere, litigants must present prescribed information in briefs in a particular format. For instance, in many jurisdictions at the trial level, litigants must clearly state

[187] Wolfe, *supra* note 40, at 406-07; *see also* 20 C.F.R. §§ 404.942, 416.1442 (2013).
[188] Wolfe, *supra*, note 40, at 425. Some commentators, indeed, believe that the ALJ's limited role contributes substantially to the inefficiency. *See, e.g.*, *id.* at 426-27.
[189] Astrue Testimony, *supra* note 9.
[190] *See infra* Part V. *See* Soc. Sec. Admin., POMS § DI 80850.005-Video Hearings (July 19, 1996), *available at* http://policy.ssa.gov/poms.nsf/lnx/0480850005.
[191] *See* Wolfe, *supra* note 40, at 406-07, n.94.
[192] *See* Richardson v. Perales, 402 U.S. 389, 403 (1971) ("We bear in mind that [SSA] operates essentially, and is intended so to do, as an adjudicator and not as an advocate or adversary.").
[193] *See* Soc. Sec. Admin., HALLEX I-2-5-85-Use of Prehearing Questionnaires – General (Sept. 28, 2005), *available at* http://www.ssa.gov/OP_ Home/hallex/I-02/I-2-5-85.html [hereinafter HALLEX Prehearing Questionnaires]; *see generally* ADMIN. CONFERENCE OF THE U.S., SSA DISABILITY BENEFITS PROGRAMS: THE DUTY OF CANDOR AND THE SUBMISSION OF ALL EVIDENCE 6-8 (2012), *available at* http://www.acus.gov/sites/default/files/documents/ACUS_Final_ Report_SSA_Duty_of_Candor.pdf [hereinafter DUTY OF CANDOR] (discussing obligation of claimants and their representatives under current SSA regulations to disclose evidence).

the relief requested[194] and, at the appellate level, litigants often must include a section describing the relevant standard of review.[195] Moreover, litigants customarily must compile items such as the complaint and transcripts in a record appendix.[196] The failure to require anything of claimant representatives is more telling in that there is no government representative, unlike in litigation with the government generally, to marshal the information and present it in a way to ease the burden on the judicial factfinder.

A. Requiring Presentation of Information Before the Hearing

In this section, we trace three ways to enhance case management by utilizing the claimant's representative to streamline the adjudication process.

First, mandating all medical records to be submitted before the hearing and requiring additional prescribed information to be presented in a pre-hearing brief would clarify the record and save the agency time.[197] The agency by rule could direct claimants to assemble and summarize all the critical information before a hearing is scheduled, such as prior work history, asserted impairment, medical records, onset date, RFC, and the like. Much time is spent by the ALJs and staff sifting through the record, and delays arise when, right before a hearing, ALJs realize that key medical evidence is missing.[198] Such clarity might precipitate more on-the-record decisions to award allowances and

[194] S*ee* FED. R. CIV. P. 12(b)(6) (2013).
[195] S*ee* FED. R. APP. P. 28(a)(9)(B) (2013).
[196] Agencies at times require full disclosure as well. Practice before the Patent & Trademark Office provides one example. *See* 37 C.F.R. § 1.56(b) (2013).
[197] Claimants already have the burden of proof to demonstrate disability. *See* 20 C.F.R. §§ 404.1512(a), 416.912(a) (2013) (including furnishing "medical and other evidence that [SSA] can use to reach conclusions about [claimants'] medical impairment(s). If material to the determination whether [claimants] are blind or disabled, medical and other evidence must be furnished.").
[198] *Cf.* Williams v. Astrue, 788 F.Supp.2d 769, 776 (N.D. Ill. 2011) (explaining that the ALJ was left to rely mostly on hearing testimony and draw inferences from the record in the absence of medical evidence from the relevant period).

thereby minimize delay for the claimants.[199] Requiring a pre-hearing brief and disclosure of all medical records would make for a crisper, more focused hearing. Representatives and claimants who intentionally omit relevant information obfuscate the record and could face adverse consequences.[200]

Experience from the National Hearing Centers ("NHC"), five offices established by SSA to adjudicate claims via video as part of a strategy to reduce the hearings backlog,[201] supports this recommendation. There, attorneys employed by the ALJs work up the cases and present a pre-hearing brief to the supervising ALJs.[202] According to the IG report, the vast majority of ALJs interviewed found the briefs extremely helpful.[203] Our recommendation shifts the burden to the claimant to save agency resources, particularly in venues outside the NHC.

To be sure, claimant representatives (or claimants themselves) might use such pre-hearing briefs to marshal information from the often-voluminous files to create as strong a position for the claimants as possible. After all, that is the attorney's craft. ALJs might be too overworked to locate conflicting information deep in the file. On the other

[199] After this project was launched, SSA initiated a parallel study to consider whether to impose a duty to disclose information upon the claimant, analogous to a prosecutor's duty pursuant to *Brady v. Maryland*, 373 U.S. 87 (1963), to ensure that *all* relevant information be presented to the ALJ for determination, as opposed to snippets of evidence that can be misleading. The very consideration of such a proposal highlights the current weakness in the system for generating an adequate record. We fully encourage the adoption of the options put forward in the subsequent study that impose a disclosure duty upon claimants. *See* DUTY OF CANDOR, *supra* note 193, at 39-41.

[200] *See* Drew A. Swank, *Money for Nothing: Five Small Steps to Begin the Long Journey of Restoring Integrity to the SSA Disability Program*, 41 HOFSTRA L. REV. 155, 170-74 (2012) [hereinafter Swank] (setting forth potential consequences and embracing requirement of full disclosure).

[201] SOC. SEC. ADMIN. OFFICE OF THE INSPECTOR GENERAL, A-12-11-11147, THE ROLE OF THE NATIONAL HEARING CENTERS IN REDUCING THE HEARINGS BACKLOG 1 (2012), *available at* http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-11-11147.pdf [hereinafter ROLE OF THE NHC].

[202] ROLE OF THE NHC, *supra* note 201, at 1-2.

[203] *Id.* at 8.

hand, claimant representatives currently have the option to file such pre-hearing briefs,[204] and many have not done so, whether to conserve effort or for reasons of strategy.[205] Our proposal to make the pre-hearing brief option mandatory would, therefore, not invest claimants with any new power. And, the prospect of discipline might chill selective presentation of evidence.

Second, requiring pre-hearing briefs also would facilitate settlement. Unlike with most civil litigation, currently there is no formal settlement process in the 800,000 cases filed before ALJs annually. All must proceed to a hearing or be paid in full. Indeed, unlike in a typical civil case, the amount that would be due assuming disability rarely is at issue because of calculations from work history. Pressuring or permitting claimants to negotiate a lesser disability amount given some uncertainty in eligibility seems inconsistent with the statutory system. Claimants either are disabled or not.

At least two subsets of cases, however, are well suited for settlement. First, a number of cases turn on the onset date of the disability.[206] The only issue for resolution in such cases is the amount of disability owed in the past. Such a fact-bound issue is appropriate for settlement. Settlement would ensure that claimants receive benefits faster, eliminate the need for a hearing, and preserve ALJ resources. Some onset cases currently are adjudicated relatively quickly in the on-the-record hearings, but the ALJ resources expended are unnecessary. SSA instead could delegate the power to settle the case to an attorney adviser – such advisers already are employed by the program and

[204] THE OFFICE OF THE CHIEF ADMIN. LAW JUDGE OF THE SOC. SEC. ADMIN., BEST PRACTICES FOR CLAIMANTS' REPRESENTATIVES 7 (2011), *available at* http://www.ssa.gov/appeals/documents/ BestPractices_508. pdf.

[205] ALJs have the authority to request pre-hearing questionnaires. *See* HALLEX Prehearing Questionnaires, *supra* note 193.

[206] For examples of cases in which disability onset dates were at issue, *see, e.g.*, Blea v. Barnhart, 466 F.3d. 903 (10th Cir. 2006). Magallanes v. Bowen, 881 F.2d 747 (9th Cir. 1989); Larlee v. Astrue, 694 F. Supp.2d 80 (D. Mass. 2010); Folio v. Astrue, 2008 U.S. Dist. LEXIS 63907 (D. Ariz. 2008).

could readily adapt to the settlement challenge.[207] They would present settlement to the ALJ for approval.[208]

In addition, settlement is also possible in cases in which the disability has concluded and the only issue is duration. Many claimants have received a traumatic injury such as from a car crash or accident at the workplace. With time and therapy, they can reenter the workplace. The critical question in such cases is duration.[209] When pre-hearing briefs reveal that the only issues for resolution are onset date and/or duration, the claims can be diverted for settlement discussions.

There is no way to ascertain the number of cases in which only onset date or duration is at issue because SSA for some reason does not code such disputes. Nonetheless, even if 5% of the 800,000 cases annually fall within such categories, gains from such settlement would be significant.[210] We believe that, given the narrow issue at stake, the prospect for settling most of such cases is strong. Thus, assuming the 5% figure, tens of thousands of cases annually might be removed from hearings through settlements, and claimants would receive much-needed funds more rapidly.

Third, a pre-hearing brief requirement would furnish yet another reason to close the record, something that has been urged in many quarters for a long time.[211] Currently,

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[207] An assessment of current workloads would need to be conducted in order to gauge the feasibility of adding an additional task.

[208] Alternatively, the agency could assign attorneys working at SSA's OGCto serve in this settlement role, and settlements would then be approved by OGC rather than by the ALJ, freeing up more time for ALJs.

[209] There may be other cases suitable for settlement. For instance, in some cases there are disputes as to the amount of money that the wage earner had made prior to the disability.

[210] *See* Wolfe, *supra* note 40, at 423 (noting that appeals based on issues other than disability itself are "statistically significant").

[211] *See, e.g.*, *id.* at 419; Frank S. Bloch, Jeffrey S. Lubbers, & Paul R.Verkuil, *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1, 7-8 (2003); IMPROVING THE QUALITY OF BENEFIT AWARD DECISIONS, *supra* note 12, at 5. SSA requested that the Office of the Chairman of the Admin. Conference of the U.S. study the impact of the pilot program in Region I which, among other things, closes the evidentiary record five days before the ALJ hearing absent a showing of good cause. *See* 73 Fed. Reg.

claimants can furnish new evidence, usually physician records, even after the hearing before the ALJ.[212] ALJs must delay hearings and, at times, re-hear a case in light of the new evidence.[213] And, should claimants present new evidence after the ALJ decision, the Appeals Council often remands the case for yet another hearing. According to the Appeals Council's data, 5% of the cited reasons for remanding a case back to ALJs were based on introduction of new evidence after the ALJ hearing.[214] Those remands account for 7000 additional hearings that would not have been required but for lack of an evidentiary cutoff. Moreover, 3% of all cases remanded from the federal courts addressed insufficient attention paid to evidence submitted after the ALJ decision.[215] The open record rule is incompatible with efficient adjudication.[216]

Accordingly, we examined the remand data from the Appeals Council in cases arising from Region I to determine the remand rate.[217] Region I is the only SSA region in which claimants (or their representatives) are required to submit written evidence five business days prior to the scheduled date of the ALJ hearing, subject to certain exceptions.[218] Although no definitive conclusions can be drawn, we note that the remand

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2411 (Jan. 15, 2008) and 76 Fed. Reg. 24802 (May 3, 2011). Admin. Conference staff is currently conducting this study and a final report is expected in the summer of 2013.

[212] Soc. Sec. Admin., HALLEX I-3-3-6-New and Material Evidence (Dec. 27, 2012), *available at* http://www.ssa.gov/OP_Home/hallex/I-03/I-3-3-6.html (In Region I, 20 C.F.R. § 405.401(c) (2012) applies).

[213] Interview with Hon. Zachary Weiss, Admin. Law Judge, Soc. Sec. Admin. (Mar. 1, 2013); Logan Interview, *supra* note 182.

[214] Each remanded decision is coded by the Appeals Council with up to three reasons for remand. The percentages reported here reflect the number of cases where new evidence was cited as a reason for remand, relative to the total number of cited remand reasons. New evidence was cited with a 4.5% frequency rate as a reason for remand in FY 2009, a 4.7% frequency rate in FY 2010, and a 4.4% frequency rate in FY 2011. Information on other reasons for Appeals Council remands can be found in STATISTICAL APP., *supra* note 7, at 58-59.

[215] For court examples, *see, e.g.*, Brews v. Comm'r Soc. Sec. Admin., 682 F.3d. 1157 (9th Cir. 2012); Schala v. Apfel, 134 F.3d 496 (2d Cir. 1998).

[216] SSA Region I is an exception, in which claimants are (generally) required to submit all written evidence "no later than five business days before the date of the scheduled [ALJ] hearing." 20 C.F.R. § 405.331(a) (2013).

[217] STATISTICAL APP., *supra* note 7, at Part V.A.3.

[218] *See* 20 C.F.R. § 405.331 (2013).

rate from Region I is significantly lower (although not the lowest) than the median, perhaps in part due to the rule barring introduction of new evidence after the ALJ hearing.[219]

Moreover, an open record prevents settlement. As we have suggested, facilitating settlement is in the interests of all sides – claimants receive benefits earlier and SSA avoids the expense of adjudication. SSA and claimants will not be able to determine whether settlement is appropriate and, if so, at what level unless the record is closed.

***Recommendation 2 – Pre-Hearing Briefs by Claimants or Their Representatives*:** We recommend that SSA require claimants to furnish all relevant medical information and to summarize justification for their eligibility in a pre-hearing brief, after which no new information could be submitted. Altering the case management system as sketched above (*e.g.*, pre-hearing briefs) would reflect a modest change that could benefit claimants, while saving ALJs time and resources by reducing the demand on ALJs appreciably. Many claimant representatives file pre-hearing briefs currently, so the additional burden imposed would be marginal. Unrepresented claimants – who account for approximately 20% of claimants at the hearing level[220] – could also file pre-hearing briefs. The greater transparency would clarify issues to resolve at the hearing even aside from the prospect of facilitating settlement.

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[219] *See* STATISTICAL APP., *supra* note 7, at 55 tbl. A-25. Six percent of remands were from Region I. *Id*. Region VIII had the lowest number of remands, comprising 2% of all remands. *Id.* Other regions with relatively low remand rates included Region VII (6%) and Region X (7%). By contrast, regions with the highest remand rates included Region IV (21%), Region VI (14%), and Region IX (13%). *Id.* Percentages were calculated relative to the total number of remands, and did not account for differences across regions in the number of dispositions or claims filed. *Id.* at 53.

[220] *See supra* n.43 and accompanying text.

B. Enhancing Communication Between ALJs and Decisionwriters

In addition to the need to improve case management, communication between ALJs and staff has proven problematic.[221] Given the time demands, communication between ALJ and staff must be as seamless as possible. In particular, we believe that the separation between decisionwriters and ALJs has engendered much of the weakness in ALJ decisions.

First, there may be poor communication between ALJ and decisionwriter. Some ALJs may give scant instruction and leave it up to the decisionwriter to figure out how to allow or deny a claim.[222] The problem is that the decisionwriters have not made the credibility decisions or determined the weight of all critical information in the file.[223] As a result, there may well be gaps in reasoning.[224]

Second, the split between ALJ and decisionwriter, whom he or she does not superintend, makes it likely that the ALJ has less pride in authorship. Some ALJs may, of course, rigorously edit the work of decisionwriters to make it their own. Others may be content if the decisionwriters get the gist of their reasoning. Given the incredible caseload, it is understandable that many ALJs edit only lightly. Although difficult to

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[221] *See e.g.*, AALJ Survey, *supra* note 179 (documenting ALJs' frustrations). Some illustrative text comments from respondents include: "The writers want information spoon-fed instead of using reasoning to get to my conclusion." *Id.* (comment #4). "The writers are also under increasing pressures to just crank out a decision and they do not pay attention to the instructions." *Id.* at 37 (comment #5). "[T]he writers do what SSA management tells them to do, which may have little or nothing with getting out good draft, which mean that the writers get the fact of the case wrong, or they get the law of the case wrong, or they fail to fully and fairly discuss credibility." *Id.* at 37-38 (comment #11). "[S]ome decisions are so chaotic it is hard believe writers understand the concept of longitudinal or chronological." *Id.* at 39 (comment #38). "They should be able to work with a Judge understadn [sic] the Judge's theory and have the Judge give them the RFC and the writers should be able to write a very specific, detailed, legal opinion that needs little review or editing. I know of very few writers who can do that." *Id.* at 42-43 (comment #84). Overall, however, 69.2% of the ALJs responding to the survey were satisfied with the quality of the work of the decisionwriters in their office. *Id.* at 6 (Question #9).

[222] Interview with Hon. Susan Blaney, Admin. Law Judge (ret.), Soc. Sec. Admin. (Feb. 7, 2013) [hereinafter Blaney Interview]; Logan Interview, *supra* note 182.

[223] *Id.*

[224] *See* AALJ Survey, *supra* note 179 (describing issues between ALJs and decisionswriters from ALJs' perspectives).

prove, much of the lack of reasoned elaboration in ALJ decisions discussed before may stem from the split between ALJ and decisionwriter.

Indeed, evidence from the relatively recently created NHC reinforces this recommendation.[225] There, ALJs supervise their decisionwriters directly. The decision to create the NHC sparked intense controversy because it precluded unionization for the judges assigned to the NHC in light of their new supervisory role.[226] Yet, as the IG report noted, the ALJs at the NHC believe that the decisionwriters assigned "develop[ed] a good understanding of their supervising ALJ's preferences."[227]

SSA does not capture the remand rate for ALJs in the NHC. But, should SSA determine that the remand rate is below the mean, it should extend the initiative to one of the regional offices for a two-year period. SSA has not experimented with this new structure other than in the NHC, which focus exclusively on video hearings, so the extension to a more traditional office would determine whether the tighter ALJ/decisionwriter relationship works in that setting as well. Moreover, unlike with the NHC, the rearrangement should be neutral with respect to unionization – ALJs should be allotted decisionwriters and have some supervisory input over their work but not have to leave the union as a price for the greater responsibility.[228] No ALJs in the NHC can join a union.[229]

Recommendation 3 –Assignment of Decisionwriters to ALJs: We recommend a pilot project in which, for a two-year period, ALJs in one regional office are assigned two

[225] The first NHC office opened in Oct. 2007. ROLE OF THE NHC, *supra* note 201, at 1.
[226] ROLE OF THE NHC, *supra* note 201, at 8 n.15.
[227] *Id.* at 7.
[228] For purposes of this study, we have not considered how best to structure the pilot project to permit – if desired – continued unionization for the ALJs involved. Best efforts should be made to separate restructuring from the question of unionization.
[229] Bargaining unit employees cannot manage other bargaining unit employees. Union judges cannot manage union decisionwriters, at least directly. *See generally* 5 U.S.C. §§ 7103 *et seq.* (2013).

decisionwriters or law clerks to help them work up and write initial drafts of decisions. The assigned decisionwriters would understand the reasoning of the ALJ and be able to craft a draft much more to the thinking of the ALJ. ALJs must supervise the clerks at least in part and, accordingly, will assume more responsibility for the end product. In that way, the drafts likely will be better analyzed and more able to withstand review at the Appeals Council or federal court level. The ALJs may spend somewhat more time writing opinions but save time in working up the case. Ultimately the drafts should improve and the likelihood of remand decrease, thus minimizing the number of hearings. If the statistics after the trial period do not show that such ALJ decisions are remanded less, or do not show that ALJs can keep up with the workload, then the project should be dismantled.

V. VIDEO HEARINGS

SSA has encouraged greater utilization of video hearings, and the number of such hearings each year has increased. In FY 2011, ALJs conducted approximately 20% of all hearings via video.[230] Video hearings can reduce the backload of cases and limit expenditures by minimizing the need for ALJ and claimant travel,[231] obviating payment for travel costs.[232] For example, if there is a backlog in New York City, ALJs across the country can step in to help by adjudicating the backlog via video. It is estimated that SSA's use of video hearings will save $52 million to $109 million over a 10-year

[230] SOC. SEC. ADMIN. OFFICE OF THE INSPECTOR GENERAL, A-05-12-21287, CONGRESSIONAL RESPONSE REPORT: THE CURRENT AND EXPANDED USE OF VIDEO HEARINGS 3 (2012), *available at* http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-12-21287.pdf [hereinafter VIDEO HEARINGS REPORT].

[231] SSA currently reimburses ALJs, claimants, and even claimant representatives for trips in excess of 75 miles. Reimbursement may cover travel costs, meals, and at times lodging. *See* www.socialsecurity.gov/appeals/hearing_process.html (providing when the agency can pay for travel costs).

[232] The IG report determined that such savings were difficult to calculate with any precision, but at least resulted in savings of several million dollars a year. VIDEO HEARINGS REPORT, *supra* note 230, at 9, 15.

period.[233] Although we did not find that video hearings reduced disparities among ALJs,[234] SSA for a variety of reasons,[235] might encourage utilization of video even more expansively by promising claimants less waiting time if they resorted to video, or even mandating use of video by all concerned. SSA has stated that expanded use of video services is a priority.[236]

To date, however, there has been scant assessment of the *impact* of video hearings on the ALJ hearing itself. In a 2006 report, the Social Security Advisory Board noted: "The comments we have heard on the use of [video hearings] have been overwhelmingly positive . . . . The technology obviously meets the requirements of due process, and it is in widespread use in other types of adjudications."[237] Some might posit that ALJs are more sympathetic to claimants whom they see face-to-face, and therefore that video hearings would tend to be tougher on claimants. Or, conversely, to the extent that ALJs no longer observe claimants' behavior before and after the hearing, perhaps ALJs are likely to be more pro-claimant in video hearings given that such observation, at times, may lead ALJs to doubt the credibility of claimant testimony.

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[233] E-mail from Elizabeth Ochoa, Senior Auditor, SSA OIG Office of Audit, to Funmi Olorunnipa, Att'y Advisor, Admin. Conf. of the U.S. (June 28, 2012) (on file with ACUS).

[234] *See* STATISTICAL APP., *supra* note 7, at 40. Data provided by SSA on yearly disposition outcomes indicate the opposite pattern, with larger variance across ALJs in allowance rates for video hearings (SD=.25) than for non-video hearings (SD=.17). *Id*. However, these numbers are not directly comparable, due to differences in the number dispositions used in the calculation of rates for these two conditions. *Id*. at 41-42. The variance due to sampling error for rate statistics is influenced by the number of data points. Specifically, the SD of a rate *p* computed from *n* data points is $\sqrt{p(1-p)/n}$. *Id*. at 42. As the number of data points increases, the SD of the rate will decrease. *Id*. From our data, the average yearly allowance rate for non-video hearings was .50 based on an average of 101 dispositions, while the average yearly allowance rate for video hearings was .55 based on an average of 350 dispositions. *Id*. Given these values, the expected SD due to sampling error would be .05 for video hearings, and .03 for non-video hearings. *Id*.

[235] In addition to cost savings, video hearings may serve as a check on speculation that there is a "small town" bias that arises because the rumored allowance rates of judges in small towns exceed those elsewhere due to the understandable empathy that an ALJ may have for an applicant. The suggestion is that ALJs when in more frequent contact with claimants, whether in a grocery store, church, or post office, tend to be more sympathetic. Due to limitations in the data received, we were not able to test this hypothesis, but a rational agency could utilize video as an antidote if such bias existed.

[236] ANNUAL PERFORMANCE PLAN, *supra* note 3, at 27.

[237] *See* IMPROVING THE HEARING PROCESS, *supra* note 13, at 21.

More generally, however, videoconferencing technology is in widespread and accepted use today in a broad spectrum of administrative, civil, and, occasionally, criminal proceedings.[238] Some studies suggest that use of video hearings in these contexts does not have a statistically significant effect on either perception of witnesses or outcomes.[239] On the other hand, a recent study of video hearings in asylum cases concluded that the allowance rate in video cases was sharply lower than for the rate in more traditional face-to-face hearings, though lower representation rates for asylum applicants at video hearings makes it difficult to draw broad generalizations.[240]

Our analysis of the data collected from SSA is not definitive, but lends credence to the conclusion that a switch to video hearings does not materially affect the outcome. We looked at two sets of data to examine the impact of video hearings. First, we compared the allowance rate between video and traditional hearings. We found a 3% differential – the allowance rate in video cases is 3% less than for other determinations.[241] Over time, this differential has remained relatively constant.[242] We

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[238] *See, e.g.*, Frederic I. Lederer, *The Potential Use of Courtroom Technology in Major Terrorism Cases*, 12 WM. & MARY BILL OF RTS. J. 887, 908-14 (2004); *see also* Federal Judicial Center, *Report of a Survey of Videoconferencing in the Court of Appeals* 1 (2006), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/vidconca.pdf/$file/vidconca.pdf [hereinafter *Videoconferencing Survey*] (discussing results of survey of appellate judges in the Second, Third, Eighth, Ninth, and Tenth Circuits using videoconferencing for oral arguments and noting that, for judges interviewed, the benefits of such technology outweighed the disadvantages); Fed. R. Civ. P. 43(a) ("For good cause . . . the court may permit testimony in open court by contemporaneous transmission from a different location."); National Center for State Courts, Videoconferencing Survey 2010 Results (Sept. 2010) (finding widespread use of videoconferencing for civil and criminal (bail) hearings by state courts), *available at* http://www.ncsc.org/services-and-experts/areas-of-expertise/technology/~/media/Files/Video%20Conferencing%202010/Videoconferencing%20Survey-3.ashx.

[239] *See* Lederer, *supra* note 238, at 908-09; *Videoconferencing Survey*, *supra* note 238, at 1, 7-12.

[240] See discussion in Frank M. Walsh & Edward M. Walsh, *Effective Processing of Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 Geo. Immigr. L.J. 259, 271-272 (2008) (finding that in FY 2005 and FY 2006, claimants who had hearings in person were almost twice as likely to be granted asylum as those who had hearings by video). However, more claimants were unrepresented in hearings done by video than those done in person, so the difference in grant of asylum rate found may not have been as profound.

[241] *See* STATISTICAL APP., *supra* note 7, at 40.

also considered the incidence of representation in video cases to see if that might account for any differential. Representation rates were not substantially different.[243] The lowest allowance rate was 4% and the highest allowance rate was 98%.[244] In light of that substantial variance among ALJs, the three percentage point difference overall seems modest.

Second, we compared the allowance rates of ALJs who conducted both video and traditional hearings to determine if there was a significant difference in allowance rate in those two settings for each particular ALJ. A majority of ALJs decided for claimants more in face-to-face than in video hearings, although the differential was modest.[245] Thus, we did not observe substantially different allowance rates in video as compared with traditional face-to-face hearings for those ALJs who conducted both types of hearings.

This is not to slight the dignity interests at stake in disability hearings. The ability to tell one's story directly to the decisionmaker respects the seriousness and importance of the claim. Win or lose, claimants likely have more faith in the system if they obtain the chance to address the judge on a more intimate level. Indeed, courts in related contexts have noted the differences between in-person and video testimony. For instance, in the asylum setting, the Seventh Circuit in *Thornton v. Snyder*[246] stated that the "importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth

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[242] E-mail from Ben Gurga, SSA Program Analyst, SSA, to Scott Morris, Associate Dean & Professor, IIT College of Psychology (Feb. 28, 2013) (on file with author).
[243] *Id.*
[244] *See* STATISTICAL APP., *supra* note 7, at 13-14.
[245] *Id.* at 29-31, 40-42.
[246] 428 F.3d 690 (7th Cir. 2005).

telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition."[247] Similarly, the Fourth Circuit in *Rusu v. INS*[248] stated in an asylum case that "[v]irtual reality is rarely a substitute for actual presence and . . . even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it."[249]

While the "ceremony of trial" is ingrained in our culture, contemporary studies have questioned the salience of demeanor evidence. "[T]here is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments."[250] Ordinary observers often do not derive benefit from observing either a person's face or that person's nonverbal behavior.[251] In fact, in the court context,

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[247] *Id.* at 698.
[248] 296 F.3d 316 (4th Cir. 2002).
[249] *Id.* at 322.
[250] Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1076 (1991); *see also* Gregory L. Ogden, *The Role of Demeanor Evidence in Determining Credibility of Witnesses in Fact Finding: The Views of ALJs*, 20 J. NAALJ 1, 3-4 (2000), which states:

> Social science research casts significant doubt on the core assumption behind the weight given to demeanor evidence in making credibility determinations. Specifically, the psychological studies show that the non verbal cues associated with demeanor evidence do not provide increased accuracy in making credibility determinations, either in detecting whether a witness is telling the truth or lying, or in assessing the believability of a witness who may be sincere but inaccurate or mistaken in their testimony.

Id. at 3-4; Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 CARDOZO L. REV. 2557, 2558 (2006) (noting that a series of social science studies in the early 1990s demonstrated "that test subjects in laboratory experiments correctly determined when a person was lying only slightly more than half the time," therefore undermining the traditional view that juries can make accurate credibility determinations from observation of demeanor). The article goes on to say that current studies show that demeanor evidence is more complicated, and that "biases about witness credibility play a large role in determining whether deception will be caught." *Id.*
[251] *Id.* at 1088. The study states:

> Taken as a whole, the experimental evidence indicates that ordinary observers do not benefit from the opportunity to observe nonverbal behavior in judging whether someone is lying. There is no evidence that facial behavior is of any benefit; some evidence suggests that observation of facial behavior diminishes the accuracy of lie detection. Nor do paralinguistic cues appear to be of value; subjects who receive transcripts consistently perform as well as or better than subjects who receive recordings of the respondent's voice. With respect to body cues, there is no persuasive evidence to support the hypothesis that lying is accompanied by distinctive body behavior that others can discern.

Id.

> [w]hen a juror is told that he may use a witness's conduct, manner, bearing or demeanor in order to assess that witness' credibility, the juror will attempt to use cues and behavior which actually mislead him and cause him to conclude that a witness is perjurious more often than the juror should.[252]

In the administrative adjudication context, using demeanor to determine credibility does not fare much better. A survey was given to ALJs to test the role of demeanor evidence in determining witness credibility.[253] "Demeanor evidence ranked dead last in terms of relative importance as a fact finding factor."[254] ALJs place "relatively low value . . . on demeanor evidence by comparison to other relevant factors."[255] Thus, even if video hearings impaired an ALJ's ability to assess demeanor evidence, there likely would not be an adverse impact on accuracy.

Recommendation 4 - Use of Video Hearings: In short, the government's interest in flexibility, coupled with both the sophistication of advanced video techniques, and the fact that the disposition rates of hearings conducted via video as compared with hearings conducted in-person are relatively similar, supports greater utilization of video in social security disability hearings. The video questioning may be viewed by some as not as effective as face-to-face questioning, but it comes close enough to satisfy basic principles of fairness. As Justice Scalia commented in *Barnhart v. Thomas*[256] "[t]here is good reason to use a workable proxy" in social security determinations. Given that the system "is probably the largest adjudicative agency in the western world … the need for

[252] Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1197 (1993).
[253] *See generally* Ogden, *supra* note 250.
[254] *Id.* at 22.
[255] *Id.*
[256] 540 U.S. 20 (2003).

efficiency is self-evident."[257] Thus, we recommend – as did the Social Security Advisory Board in 2006[258] – that SSA continue its push to utilize video technology more widely.

VI. ASSESSING THE APPEALS PROCESS

A. Appeals Council Functions

SSA long has experimented with how best to utilize its Appeals Council. The Social Security Board created the Council in 1940, originally with three members, to review work of the referees who at that point resolved claims for benefits.[259] After the enactment of the Administrative Procedure Act ("APA"), SSA granted disappointed claimants the right to appeal adverse decisions to the Council and delegated its final decisionmaking power to the Council.[260]

Prior to 1980, SSA did not have a formal program for Appeals Council review of *unappealed* ALJ allowance decisions – generally referred to as own motion review – and, as a consequence, reviewed such decisions infrequently.[261] The caseload before the Appeals Council thus consisted largely of appeals from ALJ decisions denying benefits. In 1980, Congress passed a set of statutory reforms of the Social Security disability program to, among other things, streamline the hearings process, address the proliferation

[257] *Id.* at 28 (citation omitted).
[258] IMPROVING THE HEARING PROCESS, *supra* note 13, at 21.
[259] Irving Ladimer, *Hearing and Review of Claims and Wage-Record Cases Under Old-Age and Survivors Insurance*, 3 SOC. SEC. BULL. 21, 22-23 (July 1940).
[260] The statutory authority is implicit: "The Commissioner of Social Security is further authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper for the administration of [disability benefits programs]." 42 U.S.C. § 405(b)(1) (2013).
[261] *E.g.*, RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.10 (5th ed. 2010). The Social Security Act nonetheless provides the agency with wide discretion to establish procedures governing the process for adjudicating disability claims, including entertaining own motion review of ALJ allowance decisions. *See, e.g.*, *supra* note 260.

of claims, and respond to perceived inconsistencies in ALJ decisionmaking.[262] The so-called "Bellmon Amendment," which was part of this enactment, specifically directed the agency to launch a program for Appeals Council review of ALJ decisions allowing disability claims prior to payment or "effectuation."[263] While the particular program initiated by SSA as a result of the Bellmon Amendment was largely abandoned after several years due to legal challenges,[264] SSA nonetheless has maintained some form of regulatory own motion review under its regulations since that time.[265]

Currently, the Appeals Council reviews ALJ decisions in two ways. Most prominently, disappointed claimants enjoy the right to appeal, and approximately 173,000 did so in FY 2011.[266] The Council processed 126,992 requests for reviews the same year, some of which were filed the year before, and the average processing time was 360 days.[267] Of those reviews, 75.6% were denied or dismissed, 21.2% remanded, 1.4% fully allowed and 1.1% partially allowed.[268]

Second, SSA on its own motion can select a sampling of cases for the Appeals Council to review pre-effectuation or before the ALJ decision becomes a final decision of the agency. The SSA regulation provides that "[w]e will identify cases for referral to the

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[262] Pub. L. No. 96-265, 94 Stat. 441 (1980); *see also* John R. Kearny, *Social Security and the "D" in OASDI: The History of a Federal Program Insuring Earners Against Disability*, 66 SOC. SEC. BULL. 3, 14-15 (2005/2006).
[263] Pub. L. No 96-265, § 304(g), 94 Stat 441, 456 (1980) (codified at 42 U.S.C. § 421 note); *see also supra* Part VI.C (discussing Bellmon Amendment).
[264] *See* discussion *infra* Part VI.C.
[265] *See, e.g.*, 20 C.F.R. §§ 404.969(a)-(d), 416.1469(a)-(d) (2013) (setting current regulatory procedures for identification of own motion review cases).
[266] *Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 112th Cong. (June 27, 2012) (statement of Jeffrey S. Lubbers, Professor, American University Washington College of Law) (citing SSA, General Appeals Council Statistics, http://www.ssa.gov/appeals/ac_statistics.html) (last visited Feb. 25, 2013).
[267] Soc. Sec. Admin. Office of Appellate Operations Executive Director's Broadcast (Oct. 7, 2011) (on file with author).
[268] The percentage of cases remanded has declined over the years, which might suggest improvement in ALJ decisionmaking. *See* ASPECTS OF DISABILITY DECISION MAKING, *supra* note 1, at 62.

Appeals Council through random and selective sampling techniques, which we may use in association with examination of the cases identified by sampling."[269] Despite this regulatory authorization for selective sampling, SSA currently selects cases for the Appeals Council to review on own motion purely on a random (rotational) basis.[270] In FY 2011, own motion cases represented roughly 3.4% of the Council's docket.[271]

Both ALJs and the Appeals Council are lodged within ODAR. In 2010, the Appeals Council created the Division of Quality Review ("DQR"), which focuses on enhancing the consistency of ALJ decisions.[272] DQR alerts the Appeals Council to questionable determinations in the random sampling of cases it reviews.[273] In FY 2011, DQR examined 3692 Fully Favorable cases in favor of claimants pre-effectuation, and the Appeals Council took own motion review of 812 cases, or 22%, because of weaknesses in analyses. Ultimately, the Council issued 73 Fully Favorable decisions, 57 Partially Favorable decisions, and returned 550 cases to ALJs for further development.[274] Another 128 had not been resolved by the end of the FY.[275]

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[269] 20 C.F.R. §§ 404.969(b), 416.1469(b) (2013); *see also* Soc. Sec. Admin., HALLEX I-3-1-30-Workup of Case by Analyst – Unappealed Review, at (A) (Oct. 13, 2011), *available at* http://www.ssa.gov/OP_Home/hallex/I-03/I-3-1-30.html [hereinafter HALLEX Unappealed Review].

[270] E-mail from Gerald Ray, Deputy Exec. Dir., Soc. Sec. Admin. Office of Appellate Operations/Admin. Appeals Judge to Harold J. Krent, Dean and Professor of Law, IIT Chicago-Kent College of Law (Aug. 30, 2012) [hereinafter Ray E-mail].

[271] The vast majority of cases the Appeals Council reviews result from actions related to appeals by claimants, but a small percentage represent own motion review (*i.e.*, bureau protests and pre-effectuation review of Fully Favorable decisions) of ALJ allowance decisions. Data from SSA show that in FY 2011, the Appeals Council processed 126,992 requests for review, whereas it processed 4351 cases under own motion review (data on file with ACUS). In FY 2012, the Appeals Council processed 166,020 requests for review, while processing 7598 cases under own motion review (same). Additionally, the Appeals Council also processes remands from federal courts. *See* Soc. Sec. Admin. Office of Appellate Operations Executive Director's Broadcast, at 3 (Jan. 13, 2012) [hereinafter Exec. Dir. Special Ed.] (on file with ACUS).

[272] SOC. SEC. ADMIN. ORGANIZATIONAL MANUAL, at Subchapter TK(II)(D) (Soc. Sec. Admin.), *available at* http://www.socialsecurity.gov/org/orgdcqp.htm#oqr.

[273] IMPROVING THE QUALITY OF BENEFIT AWARD DECISIONS, *supra* note 12, at 13-16.

[274] Exec. Dir. Jan. 2012, *supra* note 163, at 1.

[275] *Id.*

SSA must decide within 60 days of the ALJ decision whether to exercise own motion review,[276] based upon the agency's determination that review is appropriate even in the absence of an appeal by a disappointed claimant, or more commonly, when an ALJ or senior attorney advisor has directed that a claim be paid.[277] If own motion review is selected, the Council notifies claimants and provides a 25-day window for submission of additional evidence and testimony.[278] If the Council has not reached a decision within 110 days of the hearing, interim benefits must be paid and are not recaptured if the decision is overturned.[279]

There are 70 Administrative Appeals Judges ("AAJs") serving on the Council.[280] They are agency officials exercising judicial functions who lack the protections of the APA. There are 56 Appeals Officers ("AOs") who aid in the review process, and additional support staff to assist that effort.[281] A single AAJ or AO may deny review of the appeal, which makes the ALJ's denial of benefits final, while two AAJs must agree to a reversal or remand of an ALJ decision denying benefits.[282] SSA has considered inviting ALJs to serve with AAJs on the Council for a brief rotation.[283]

Third, DQR also reviews a stratum of cases post-effectuation, in other words after the ALJ's decision has become final, for quality control purposes. In FY 2011, DQR started performing post-effectuation studies on various topics based on identified

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[276] 20 C.F.R. §§ 404.969(b), 416.1469(b) (2013); *see also* HALLEX Unappealed Review, *supra* note 269, at (D).
[277] 20 C.F.R. §§ 404.969(b), 416.1469(b) (2013); see also HALLEX Unappealed Review, *supra* note 269, at (E).
[278] *See* Exec. Dir. Special Ed., *supra* note 271, at 4.
[279] *Id.*
[280] Soc. Sec. Admin., Brief History and Current Information about the Appeals Council, http://ssa.gov/appeals/about_ac.html (last visited February 13, 2013).
[281] *Id.*
[282] *See* Soc. Sec. Admin., HALLEX I-3-8-1-General (Sept. 8, 2005), *available at* http://www.ssa.gov/OP_Home/hallex/I-03/I-3-8-1.html.
[283] Exec. Dir. Jan. 2012, *supra* note 163, at 2. While ALJs have served details on the Appeals Council in the past, none are currently doing so.

anomalies including ALJs, hearing offices, medical sources, a claimant representative, and a disability issue.[284] For each focused review, DQR examines about 70 cases featuring the troubling characteristic it identified. Much of the information gained from focused review is used to enhance future training. ODAR will talk to ALJs reviewed only if a distinct pattern of errors emerges.

B. Error Correction Goals

Unlike other administrative agencies, SSA does not make policy through adjudication.[285] The Appeals Council's goal principally is to ensure that ALJ decisions correctly apply SSA policy to the facts of the case and are consistent with each other.[286] Such consistency manifests respect for the claimant and promotes the integrity and fairness of the disability adjudication system nationwide. Secondarily, the Council's objective is to enhance ALJ decisionmaking and thereby minimize the remand and reversal rate from the Appeals Council and federal courts.[287]

Many signals point to the need to correct ALJ errors. The 50% court remand rate is high and has been consistent for decades and, as previously noted, OQP's study determined that there was a 16% error rate in grants and 9% error rate for denials.[288] The quality control program instituted by the Appeals Council is commendable – it identifies sources of error in ALJ decisions so as to permit more effective training and feedback in the future. We cannot say whether, on an objective basis, the Appeals Council, ALJs, or

[284] In FY 2011, DQR performed 19 focused reviews. Exec. Dir. Oct. 2012, *supra* note 302, at 3.
[285] In contrast, the National Labor Relations Board ("NLRB") makes policy almost exclusively through adjudication. *See, e.g.*, Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 281-82 (1991).
[286] *See* Astrue Testimony, *supra* note 9 (describing that the agency relies "on the A[ppeals] C[ouncil] to improve the quality of our hearing decisions").
[287] *See id.* (describing that the Appeals Council conducts focused reviews to identify common errors in ALJ decisions).
[288] *See* REVIEW OF ALJS' DECISIONS, *supra* note 175, at 9-10.

the district courts make fewer errors, but the Appeals Council of the three institutions is the only one whose goal it is to ensure consistency throughout the system.

A recent investigation by Republican staffers on the Senate Permanent Subcommittee on Investigations reinforces the importance of the Appeals Council's goals.[289] Based on a study of 300 randomly selected cases awarding benefits from Virginia, Alabama, and Oklahoma, subcommittee investigators reviewed the cases and determined that the ALJ reasoning in about one quarter of the cases was seriously deficient. The ALJ decisions ignored salient evidence or failed to support conclusions sufficiently – the decisions "failed to properly address insufficient, contradictory, or incomplete evidence."[290]

The investigators did not necessarily disagree with the bottom line, but concluded that the decisions were legally indefensible.[291] The report summarized ALJ adjudications in which credibility determinations were mishandled, in which ALJs failed to cite relevant information, and in which ALJs misapplied SSA standards.[292] More problems are likely to arise in decisions awarding benefits because ALJs understandably may spend less time writing and editing decisions allowing as opposed to denying benefits because such allowances largely are not reviewed on appeal.[293] Nonetheless, the subcommittee's investigation reveals that many decisions upholding benefits were not just insufficiently reasoned, but wrong. Thus, the subcommittee report suggests a serious deficiency in ALJ reasoning and analysis.

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[289] *See generally* IMPROVING THE QUALITY OF BENEFIT AWARD DECISIONS, *supra* note 12.
[290] *Id.* at 3-4. For our own analysis of SSA data on the degree of variability and correlates of disposition outcomes, *see* generally the STATISTICAL APPENDIX accompanying this report. STATISTICAL APP., *supra* note 7.
[291] *See id.* at 3-5 (noting report's findings of fact).
[292] *Id.* at 3-4, 20-87, 104-32.
[293] The problem that arises, however, is that such terse decisions may create an inadequate baseline from which to determine if a beneficiary's condition has improved sufficiently. *See infra* Part VIII.

Our statistical analysis reinforces what the subcommittee staffers determined on several levels.[294] Allowance rates have become less extreme over time;[295] nevertheless substantial inconsistencies remain. For instance, in FY 2011, 10% of ALJs had allowance rates in excess of 72%, while 10% had allowance rates less than 34%.[296] Twenty-five ALJs allowed claims at least 90% of the time, and about the same number denied claims 80% of the time.[297] Although some variability is to be expected due to differences in the cases reviewed by each ALJ, the observed range of allowance rates is considerably wider than would be expected due to case differences.[298] Given the similarity in the pools of claims nationwide, disparities of this magnitude should not arise.

Moreover, the remand statistics from both federal courts and the Appeals Council previously discussed suggest that ALJ decisionmaking has room for improvement. With remand rates at close to 50% from the federal courts and over 20% from the Appeals Council, there is little question as to the need to enhance consistency and accuracy.[299]

Given the pressure to decide 800,000 cases annually, the challenges endemic to ALJ decisionmaking should not be surprising.[300] Based on the high remand rate, the subcommittee investigation, and OQP's analysis, much improvement is needed in ALJ decisionmaking.

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[294] *See* STATISTICAL APP., *supra* note 7, at Parts II.E., III.B. Federal courts have been critical as well. *See generally, e.g.*, Martinez v. Astrue, 630 F.3d 693 (7th Cir. 2011) (decrying ALJ decisions as incomplete and perfunctory).

[295] The percentage of ALJs with allowance rates over 80% dropped from 9% in FY 2009 to 4% in FY 2011. *See* STATISTICAL APP., *supra* note 7, at 15.

[296] *Id.* at 16 tbl. A-4.

[297] *Id.*

[298] *Id*. at 58-59.

[299] *See* SSA HAS TAKEN STEPS, *supra* note 62, at 18-20 (noting lack of documentation and clear articulation in cases remanded back to ALJs).

[300] The average number of decisions resolved in FY 2005 was 401. In FY 2002, the average number was 360. SOC. SEC. ADVISORY BD., IMPROVING THE SOCIAL SECURITY ADMINISTRATION HEARING PROCESS, at 12 (Sept. 2006), *available at* http://www.ssab.gov/documents/HearingProcess.pdf.

Appellate review not only results in error correction but also error prevention. If the ALJ decisions treat vocational testimony incorrectly or if they misapply the treating physician rule,[301] then such information will be of considerable help to ALJs resolving the next 500 cases on their dockets. The difficulty is that most ALJs have not until recently received notice of their reversals and remands.[302]

Appeals Council decisions are rarely published.[303] The individual ALJ generally receives a copy, as does his or her head of office, but no one else. If the ALJ switches offices, the Council does not inform the ALJ of the remand.[304] Some HOCALJs will discuss Appeals Council actions with ALJs in their office, but given time demands, those discussions are few and far between.[305] Even if the ALJ involved reads the Appeals Council decision, no other ALJ likely will.[306] Moreover, on own motion review, the Council does not inform ALJs of the disposition of cases that are not remanded back and, again, ALJs will only learn of remands if they remain in the same office. Nor does ODAR always inform ALJs of the results of post-effectuation studies, except in rare

[301] For our recent assessment of the treating source rule challenging its continuing efficacy, *see* ADMIN. CONFERENCE OF THE U.S., SSA DISABILITY BENEFITS PROGRAM: ASSESSING THE EFFICACY OF THE TREATING PHYSICIAN RULE (2013), *available at* http://www.acus.gov/research-projects/social-security-disability-adjudication (last visited Apr. 3, 2013).

[302] In Aug. 2011, the Appeals Council rolled out "a web-based system called 'How MI Doing?' (HMID)." Exec. Dir. Special Ed., *supra* note 271, at 5. The HMID resource gives adjudicators extensive information about remands, including the reasons for remand, as well as information on performance in relation to other ALJs in the office, region, and nation. *Id.* The Appeals Council is continuing to develop the system and is currently developing training modules related to each of 170 identified reasons for remands that will be linked to the HMID tool. Soc. Sec. Admin. Office of Appellate Operations Executive Director's Broadcast, at 6 (Oct. 19, 2012) [hereinafter Exec. Dir. Oct. 2012].

[303] Occasionally, the Appeals Council issues Appeals Council Interpretations, and these decisions are posted on HALLEX and may also serve as the basis for Social Security Rulings. *See* Soc. Sec. Admin., HALLEX II-5-0-1-Introduction to Appeals Council Interpretations (July 1, 2005).

[304] Telephone Interview with Gerald Ray, Deputy Exec. Dir., Soc. Sec. Admin. Office of Appellate Operations/Admin. Appeals Judge (Aug. 24, 2012).

[305] Sullivan Interview, *supra* note 179.

[306] Strides are being made to share information with ALJs. For example, through the HMID tool, ALJs can see what errors they are making, as well as overall areas proving troublesome for their peers. *See* Exec. Dir. Special Ed., *supra* note 271, at 5.

circumstances when it deems that serious errors have been made.[307] Moreover, OGC does not share with individual ALJs internal memoranda outlining reasons why it declined to pursue an appeal of a particular denial decision to court.[308]

The Appeals Council also has only recently started sharing the same information with decisionwriters.[309] Unlike in many adjudicative systems, decisionwriters do not act as clerks to the judges but rotate among judges in a particular office. As a consequence, judges may not know each decisionwriter's strength and weakness and vice versa. It may well be that some ALJs provide copious instructions to decisionwriters and review drafts carefully. Others may give scant instructions, and the Appeals Council remands may be due to shortcomings in the communication between ALJ and decisionwriter.[310] Thus, the weaknesses in the decisions remanded may reflect as much the decisionwriter's haste as that of the ALJ. Decisionwriters do not always work on the same case if remanded from the Appeals Council or federal courts, but they, too, can benefit from learning of perceived inadequacies in their analysis. Indeed, management might wish to evaluate decisionwriters in part based on remand rates.

Remands do not count against ALJs in reaching their target goals. When ALJs re-hear the same case on remand, which they generally do,[311] they benefit if they can

[307] In addition, ODAR does not inform ALJs in NHC whether their decisions have been remanded. Telephone Interview with Gerald Ray, Deputy Exec. Dir., Soc. Sec. Admin. Office of Appellate Operations/Admin. Appeals Judge (Feb. 20, 2013). It is important to note, however, that recently, more information regarding focused reviews is being shared with the Office of Chief ALJs. Exec. Dir. Special Ed., *supra* note 271, at 4.
[308] We learned that the OGC was concerned that such memos be leaked to claimants, but why ALJs would do so is unclear. Blair Interview, *supra* note 57.
[309] Decisionwriters have access to the HMID tool through which they receive feedback on the decisions they wrote that have been remanded. *See* Exec. Dir. Special Ed., *supra* note 271, at 5; Exec. Dir. Oct. 2012, *supra* note 302, at 6.
[310] Blaney Interview, *supra* note 222.
[311] *See* SSA HAS TAKEN STEPS, *supra* not 62, at 9.

dispose of a remanded case readily because they receive credit for a second disposition.[312]

SSA would provide substantial incentive for more detailed decisions if it discounted cases remanded or reversed in assessing whether each ALJ satisfied his or her goal. On the other hand, stripping ALJs of credit for remands might prompt ALJs in close cases to allow more claims, given that allowances are rarely reviewed. Moreover, a focus on minimizing the remand rate might slow down the adjudication process and thereby increase the backlog. Greater accuracy cannot be achieved seamlessly. To the extent that own motion review is enhanced to focus more on allowances, then eliminating credit for remanded cases might be plausible.[313] However, the risk of lowering the disposition rate cannot be discounted.

Finally, even when receiving information about the remands, it is possible that some ALJs do not respect the Appeals Council given that its members are not governed by the APA and may be perceived as more aligned with management.[314] In other words, ALJs may look at Appeals Council remands with skepticism. Judges on the Appeals Council are not protected under the APA and therefore lack the independence enjoyed by the ALJs.[315] Tension between management and ALJs has been simmering for years, punctuated by litigation and grievances.[316] That lack of trust can undermine the didactic role of the Council.

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[312] Evaluation based upon remand rates would not prompt decisionwriters to write more allowances given that they only write at the direction of ALJs.
[313] We suggest an analogous course, *see infra* Part VII.D. Of course, any systemic focus on quality in ALJ decisionmaking may result in a declining disposition rate.
[314] *See* Wolfe, *supra* note 40, at 382, 388, 391; *Fourth Bite at the Apple*, *supra* note 27, at 293.
[315] *Fourth Bite at the Apple*, *supra* note 27 at 293.
[316] IMPROVING THE HEARING PROCESS, *supra* note 13, at 15; Wolfe, *supra* note 40, at 388, 391.

C. Improving the Appeals Council's Role & Function

We suggest six revisions in administration of the Appeals Council that should enhance the training role of the Appeals Council at very little cost.

Recommendation 5 – Rotation of ALJs to Serve on the Appeals Council:

ODAR should rotate ALJs on the Appeals Council.[317] A rotational program would serve two purposes. First, it likely would increase the respect that ALJs have for the appeals process. ALJs would be judged by their peers, at least in part.[318] Second, the rotation should sharpen the tool kit of even the most experienced ALJ and ensure more careful analytical reasoning in the future. Assessing the mistakes of peers can help the ALJs serving on the Council avoid those mistakes when serving again as line ALJs.

To accomplish this goal, we recommend that the Office of Personnel Management ("OPM") relax its 120-day limit on rotation of ALJs. Currently, OPM's relevant regulation provides that "[a]n agency may detail an administrative law judge from one administrative law judge position to another administrative law judge position within the same agency"[319] but the obstacle is that judges on the Appeals Council are not ALJs. The regulation continues that ALJs may be assigned to perform non-administrative law judge duties only when "(1) The other duties are consistent with administrative law judge duties and responsibilities; (2) The assignment is to last no longer than 120 days; and (3) The administrative law judge has not had a total of more than 120 days of such assignments or details within the preceding twelve months."[320] Certainly, the work of the Appeals Council is consistent with ALJ duties. Accordingly, we recommend that, for a

[317] The Appeals Council has made plans to include ALJs in its review process. Exec. Dir. Special Ed., *supra* note 271, at 2.
[318] This is not the first occasion on which peer review has been advocated. For discussion of prior peer review efforts, see IMPROVING THE HEARING PROCESS, *supra* note 13, at 17.
[319] 5 C.F.R. § 930.207(b) (2012).
[320] *Id*. §§ 930.207(c)(1)-(3).

detail to be more successful, the limit be pushed to one year and the ALJ cannot have had more than one year of detail within the prior three years. Therefore, we recommend that OPM either revise its regulation to allow longer intra-agency details of ALJs to appellate bodies more generally or grant SSA a waiver, in accordance with its current regulations,[321] for the purpose of allowing details of ALJs for up to one year to the Appeals Council.

Recommendation 6 - Publication of Appeals Council Decisions: The Appeals Council should publish all or at least a significant portion of its decisions (except for summary affirmances). ALJs can benefit from others' mistakes and internalize some of the deficiencies identified in the remand decisions. Indeed, the IG Report focusing on the NHC noted that ALJs at the NHC would benefit from learning about which decisions of theirs were remanded and why.[322] A substantial percentage of remands from both the Appeals Council and federal courts evidently are prompted by insufficiently reasoned ALJ decisions. Decisionwriters can learn much from reading what the Council has identified as weaknesses in prior decisions. Claimants as well can learn when to appeal the denial of claims.

To be sure, ALJs and decisionwriters are not likely to find the time to scour thousands of Appeals Council decisions each year, but some review will be of assistance. The decisions are short, and the patterns identified by the Appeals Council should help reduce the need for review in the future. Common mistakes could be avoided in the future and excellent opinions emulated. Perhaps the Council alternatively could select a representative sampling for publishing and, at the same time, ensure that the relevant ALJ

[321] *See id.* § 930.207(d).
[322] *See* ROLE OF THE NHC, *supra* note 201, at 12.

and decisionwriter be notified of every decision, whether reached via appeal, own motion, or post-effectuation.

Recommendation 7 – Distribution of SSA Office of General Counsel Memoranda: For similar reasons, OGC should share with ALJs and decisionwriters the memoranda written by counsel that recommend remand for vulnerable ALJ decisions as opposed to defending them in court. ALJs and decisionwriters can benefit from reading why OGC believes that those decisions are not defensible in federal court.

Recommendation 8 – ALJ Drafting of Decisions on Remand from Federal Courts: We propose that ALJs, where possible, be assigned to write decisions upon remand from federal courts. The most direct way to learn from a perceived weakness in the decision is for the ALJ to write the new decision him or herself. That limited exercise should assist ALJs in giving better instructions to their decisionwriters in the future or at least in editing drafts more carefully. Even when the deficient decision is attributable more to the decisionwriter than to the ALJ, the ALJ can learn from seeing the deficiencies firsthand.

Currently, there are roughly 6000 cases each year remanded from federal court.[323] Although writing a decision upon remand will sap ALJ resources at the margin, we think the incremental addition in duties well worth the cost, and we suggest ways to free up time elsewhere in the study. Those 6000 cases represent, on average, 3.5 cases per ALJ per year, although the impact of this recommendation would vary from ALJ to ALJ.

[323] There were 6182 remands in FY 2010 and 6171 remands in FY 2011. Additional information on federal court remands can be found in the STATISTICAL APP., *supra* note 7, at 54 tbl. A-24.

Indeed, the more that ALJs are treated like "judges," including granting decisionwriting responsibilities, their ability to write legally defensible decisions may improve.[324]

Recommendation 9 – Expansion of Own Motion Review by the Appeals Council: We propose expanding own motion review. Through own motion review, the Appeals Council can play a critical role in error correction. The Council can focus on problem areas to minimize errors in the system.[325]

A brief turn to history is needed to explain why own motion review currently is so limited. Prior to 1980, SSA utilized own motion review sparingly.[326] Following enactment of the Bellmon Amendment, the agency fashioned a "Bellmon Review Program" that was intended, according to SSA, to improve decisional quality and accuracy.[327] Initially, among other initiatives, this program targeted for Appeals Council review the allowance decisions of ALJs whose allowance rates were higher than 70%, hearing offices with allowance rates over 74%, and a national random sample of ALJ decisions.[328] Over the course of the next several years, the contours of the Bellmon Review Program's targeted review changed as some aspects were discontinued (*e.g.*,

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[324] ALJs have authority to write decisions, *see* Soc. Sec. Admin., HALLEX I-2-8-25-Writing the Decision, at (D) (Sept. 2, 2005), *available at* http://www.ssa.gov/OP_Home/hallex/I-02/I-2-8-25.html. *See generally*, 20 C.F.R. §§ 404.953, 416.1453 (2013); Soc. Sec. Admin., HALLEX I-2-8-1-General (May 16, 2008), *available at* http://www.ssa.gov/OP_Home/hallex/I-02/I-2-8-1.html, but, as a general matter, do so relatively infrequently.

[325] SSA is not the only federal agency to employ own motion review. For instance, own motion review can be exercised by the Medicare Appeals Council (42 C.F.R. § 405.1110 (2012)), the Provider Reimbursement Review Board (*see* Loma Linda University v. Schweiker, 705 F.2d 1123, 1127-28 (9th Cir. 1983)), the Federal Communications Commission (47 C.F.R. § 1.117 (2012)), the Federal Aviation Administration (14 C.F.R. §§ 16.1(a), 16.241(c) (2012)), and the Federal Maritime Commission (*see* Gregory Wicker, *Federal Maritime Commission v. South Carolina Ports Authority: Judicial Incursions into Executive Power*, 69 BROOKLYN L. REV. 1555, 1560-61 (2004)).

[326] PIERCE, *supra* note 261, at § 9.10; *see also Fourth Bite of the Apple*, *supra* note 27, at 247 (discussing SSA's appellate and own motion review practices prior to 1980).

[327] *E.g.*, *AALJ*, 594 F. Supp. at 1134; *see also* Stieberger v. Heckler, 615 F. Supp. 1315, 1377-78 (S.D.N.Y. 1985), *vacated on other grounds*, 801 F.2d 29 (2nd Cir. 1986).

[328] *E.g.*, *Stieberger*, 615 F. Supp. at 1377-78; *AALJ*, 594 F. Supp. at 1134; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HDR-89-48BR, RESULTS OF REQUIRED REVIEWS OF ADMINISTRATIVE LAW JUDGE DECISIONS 8 (1989).

review of all decisions from some hearing offices), while others were modified (*e.g.*, targeted review of particular ALJs changed to focus on high own motion review rates, rather than individual allowance rates).[329] And, the agency initiated feedback and training for ALJs with high allowance rates,[330] which, in some quarters was also viewed as threatened discipline.[331] A number of lawsuits challenged the Bellmon Review Program, eventually prompting the agency to reverse course.[332]

In one prominent case, *Association of Administrative Law Judges, Inc., (AALJ) v. Heckler*[333] the court ruled that the pre-effectuation review program undermined the quasi-independence of the ALJs. ALJs recognized that they would be targeted for review more frequently the more that they ruled for claimants. The agency unsuccessfully argued that such imbalance was appropriate given that appeals by claimants served as a check on ALJs who ruled too infrequently for claimants, but that there was no analogous check on ALJs who favored claimants.[334] As one court of appeals stated, "Bellmon Review placed pressure first on ALJs to deny benefits and then, if the applicant was nevertheless successful, insinuated that the Appeals Council should reverse."[335] Another court commented about the review program that "[t]o designate high allowance ALJs for ongoing review of their allowance decisions inexorably tends to discourage these ALJs from allowing benefits in close cases."[336] Courts finally invalidated the program due to

[329] *E.g.*, *Stieberger*, 615 F. Supp. at 1377-78; *AALJ*, 594 F. Supp. at 1134-35.
[330] *Id*.
[331] *See* Wolfe, *supra* note 40, at 392-93; *but see AALJ*, 595 F. Supp. at 1138 (observing, when discussing plaintiff-ALJ's claim of "disciplinary" training under the Bellmon Review Program: "An administrative decision was made that the education of these [high allowance rate] ALJs outweighed any expense and delay involved. No punishment of any sort was intended.").
[332] *See e.g.*, *AALJ*, 594 F. Supp. at 1141-43.
[333] 594 F. Supp. 1132 (D.D.C. 1984).
[334] *Id.* at 1134-36.
[335] Barry v. Bowen, 825 F.2d 1324, 1330 (9th Cir. 1987).
[336] W.C. v. Heckler, 629 F. Supp. 791, 799–80 (D. Wash. 1985), *aff'd*, 807 F.2d 1502 (9th Cir. 1987).

the agency's failure to engage in notice and comment rulemaking, without a definitive ruling on the appropriate scope of own motion review.[337]

A decade later, the agency amended its regulations relating to pre-effectuation review.[338] The agency was careful to insulate itself from any charge that the pre-effectuation review would proceed in a biased manner.[339] To that end, the rules precluded the Appeals Council from basing its review on the identity of the ALJ or hearing office. More specifically, the regulation provides that:

> [w]e will use selective sampling to identify cases that exhibit problematic issues or fact patterns that increase the likelihood of error. Neither our random sampling procedures nor our selective sampling procedures will identify cases based on the identity of the decisionmaker or the identity of the office issuing the decision.[340]

The vice of Bellmon Review was the "unremitting focus on allowance rates,"[341] not the agency's utilization of own motion review itself.

We recommend that SSA conduct more extensive pre-effectuation review than the current random sampling method for a number of reasons. First, given that the agency itself cannot appeal an ALJ's decision, own motion review ensures balance to the process. Taxpayers deserve more of a check against ALJs who may be too generous with public monies.[342] As stated in *Matthews v. Eldridge*, the government's interest, and,

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[337] *E.g.*, W.C. v. Bowen, 807 F.2d 1502, 1505 (9th Cir. 1987); *but see* Nash v. Bowen, 869 F.2d 675, 680-81 (2nd Cir. 1988) (rejecting APA-based challenge to the Bellmon Review Program, and noting that "[p]olicies designed to insure a reasonable degree of uniformity among ALJ decisions are not only within the bounds of legitimate agency supervision but are to be encouraged").

[338] *See, e.g.*, Soc. Sec. Admin., Administrative Review Process: Identification and Referral of Cases for Quality Review Under the Appeals Council's Authority to Review Cases on its Own Motion, 63 Fed. Reg. 36,560 (July 7, 1998) [hereinafter 1998 Final Rule] (codified at 20 C.F.R. pts. 404, 416).

[339] *See* 1998 Final Rule, *supra* note 338, at 36,561-66 (discussing bases for final rule implementing random and selective sampling methods for identifying cases for discretionary own motion review by Appeals Council).

[340] 20 C.F.R. §§ 404.969(b)(1), 416.1469(b)(1) (2013).

[341] *AALJ*, 594 F. Supp., at 1143.

[342] There exist other checks in the system, including CDR and bureau protests. *See infra* Part VIII (CDR); Soc. Sec. Admin., HALLEX I-3-9-10-Protest Cases (Sept. 8, 2005), *available at* http://www.ssa.gov/OP_

hence, that of the public, in "conserving scarce fiscal and administrative resources is a factor that must be weighed." [343] Although own motion review cannot fully substitute for a government right to appeal adverse decisions, it can help to ensure greater oversight in the disability adjudication process. There is nothing unfair with an administrative system that permits the agency to review adverse determinations as long as those decisions are not coupled with threatened discipline or other adverse measures if ALJ allowance rates are too high. An ALJ has no expectation that his or her decision will invariably be treated as final under current regulations (which already provide for Appeals Council own motion review on a pre-effectuation basis),[344] nor does such review deprive ALJs of the independence guaranteed under the APA.[345]

Second, more assertive own motion review of allowances is important for assuring quality decisonmaking. If ALJs tend to write cursory decisions when allowing benefits, there may be an insufficient baseline from which to assess at a later date whether there has been enough improvement to terminate benefits in a CDR.[346] If ALJs recognize a greater likelihood that allowances will be reviewed, they will exercise greater care in editing the decisionwriter's opinions. Some ALJs may struggle to keep up with the 500-700 goal, but the quality of opinions and potential for laying an objective baseline for subsequent CDRs is a necessary condition for both allowances and denials.

Home/hallex/I-03/I-3-9-10.html (bureau protest cases); Soc. Sec. Admin., POMS § GN 03103.260-How to Protest ALJ Decisions (July 8, 2010), *available at* https://secure.ssa.gov/poms.nsf/lnx/0203103260 (same).

[343] *Mathews v. Eldridge*, 424 U.S. 319, 347-48 (1976); *see also* Sullivan v. Everhart, 494 U.S. 83, 95 (1990); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1276 (1975).

[344] *See Fourth Bite at the Apple*, *supra* note 27, at 245-49.

[345] Indeed, the APA specifically authorizes agency own motion review of initial decisions by adjudicators such as ALJs, providing, in pertinent part, that when the "presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, *or review on motion of*, the agency within time provided by rule." 5 U.S.C. § 557(b) (2013) (emphasis added). *See also* Blankenship v. Bowen, 801 F.2d 1271, 1272 (11th Cir. 1986) (holding that "it is . . . clear that the Appeals Council ha[s] the authority to review, on its own motion" decisions by ALJs); *supra* note 325, (providing illustrative list of federal agencies that use an own-motion review process).

[346] *See infra* Part VIII.

There are a number of ways to structure review and avoid the partiality asserted against the Bellmon Review Program. Currently, the Appeals Council only targets pre-effectuation review based on random sampling.[347] But, it is authorized to be more assertive. As one example, own motion review targeted at the length of hearings, which may range from fifteen minutes or two hours, may be informative given the typical hearing lasts about one hour.[348] Such review is consistent with the current regulation's disclaimer of targeting particular ALJs or offices. The decision would be targeted not at the ALJ but at the manner in which an ALJ reached the decision. In similar vein, an Appeals Council decision to target decisions that address problem areas such as the RFC in psychological cases or obesity also would steer clear of the current prohibition. To the extent that SSA has noted problematic tendencies in ALJ decisionmaking (through Appeals Council data collected remands, post-effectuation reviews, or district court remands), it can use those characteristics in exercising own motion review.

As has been urged before,[349] the Council could review such cases with an eye to making policy clarifications. For instance, Appeals Council decisions elaborating on ascertaining the RFC in cases of mental illness then could play a positive role in setting policy for all ALJs to follow. Or, the Council could target obesity cases if it determined that ALJs were struggling to assess the impact of obesity on listed impairments and use the cases to provide policy guidance.

Moreover, the regulation does not confine the Council to reviewing only ALJ allowance decisions on a pre-effectuation basis. The Council should review unappealed

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[347] *See* 20 C.F.R. §§ 404.969(b), 416.1469(b) (2012); *see also* Ray E-mail, *supra* note 270 (regarding Appeals Council's current pre-effectuation review practices).
[348] Interview with Ed Kraus. Assoc. Clinical Professor of Law, IIT Chicago-Kent College of Law (February 15, 2013) [hereinafter Kraus Interview].
[349] *See Fourth Bite at the Apple*, *supra* note 27, at 302, 305-07.

denials, particularly in cases from unrepresented claimants.[350] Review of both allowances and denials would lend greater impartiality to own motion review, even if own motion review independently can be justified by the absence of a government representative. Given that the Appeals Council reviews both allowances and denials post-effectuation, this slight expansion of the Appeals Council's own motion review should prove of little controversy.

The agency's pledge to target neither particular ALJs nor hearing offices in own motion review strikes us as excessively broad. For instance, SSA might decide to review decisions from judges whose allowance rates are both well under and well above the statistical average.[351] Indeed, several scholars have noted the potential salutary effect of using statistics as a basis for review of "outlier" ALJs (based on several SD above or below the norm) and, thereby, ensure greater decisional accuracy and consistency.[352]

Moreover, such an approach to pre-effectuation own motion review by SSA would prompt a greater dialogue with ALJs whose decisions, at least on the surface, are likely not to be consistent with SSA policy, whether deciding for or against the claimant.

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[350] Our study documents that the allowance rate is higher when claimants are represented. *See* STATISTICAL APP., *supra* note 7, at 48-49 & tbl. A-21, fig. A-15.

[351] Indeed, the preamble to SSA's 1998 Final Rule seems to contemplate the very sort of selective (focused) sampling for pre-effectuation own motion review we suggest in this report. *See* 1998 Final Rule, *supra* note 338, at 36,563. The preamble makes a point of distinguishing between a random sampling procedure permitted under the rule that applies to "variously defined categories of cases (*e.g.*, Unfavorable decisions issued between given dates)" and other sampling methodologies that expressly target individual ALJs (by name or certain hearing offices). *Id*. As discussed here, a focused review of ALJ allowance or denial decisions based on objective, statistical deviations from the norm over a given period can hardly be said to target – by identity – particular ALJs. Rather, such focused review would merely be a consequence of falling "outside" the pre-determined deviation level.

[352] *See* PIERCE, *supra* note 261, at § 9.10; *see also* Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 775 (1974) (asserting that, in the social welfare context, procedural due process encompasses "management processes which will tend to assure the accuracy of claims adjudication"); Richard J. Pierce, Jr., *Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 483, 485-86 (1990) (likening statistical analysis of ALJ decisions as part of an agency quality review to the federal sentencing guidelines, approved by the Supreme Court in *Mistretta v. United States*, since they each further due process goals by facilitating greater consistency and addressing overly wide variances in decisional outcomes).

For instance, the agency reasonably could decide to review decisions by outlier judges, those whose allowance rates were two SD from the mean. The distance from the mean strongly suggests that such judges' decisions are not due to case mix or chance, but, rather, some other factor(s) such as lack of policy compliance (whether for reasons of ideology, misapplication of regulations, or cutting corners). There should be no allegation of partiality from a review program that targets an *equal* number of judges whose rates are well outside the statistical mean, whether in terms of denying or allowing claims.[353]

Nonetheless, an issue might arise under the regulation as currently drafted because statistics particular to a judge would inform the selection process. Similarly, in this study we have focused on the allowance rates in video hearings in an effort to compare them to allowance rates elsewhere. Had the Appeals Council, on the other hand, targeted video hearings for special attention on own motion review, it likely would have violated the regulation by selecting cases for review in part based on the identity of a hearing office because ALJs at the NHC only adjudicate claims via video.[354]

Recommendation 10 - Use of Statistical Sampling and Other Neutral Criteria to Focus Discretionary Review by the Appeals Council: We therefore suggest that SSA consider revising the current regulation to clarify that pre-effectuation own motion review is permitted for any unappealed decision so long as the selection of such decision(s) is predicated on published neutral and objective criteria. The key protection lies in the publication requirement. If SSA determines to utilize own motion review to

[353] Utilizing own motion review solely for judges with allowance rates over the mean might threaten decisional independence by suggesting that the agency is only concerned when ALJs grant too many claims as opposed to too few. *Cf. AALJ*, 594 F. Supp. at 1143 (finding that "unremitting focus" of Bellmon Review Program on allowance rates violated "spirit" of APA).
[354] ROLE OF THE NHC, *supra* note 201, at 2.

assess cases arising from video hearings or from ALJs whose allowance rates are either much lower or greater than the mean, the potential for adverse impact on ALJs is minimized. At the same time, the transparency from publishing the criteria provides some protection for ALJs or claimants who distrust the own motion review mechanism. The vice of the Bellmon Review Program was not aggressive own motion review, but rather utilizing own motion review to create an atmosphere that seemingly pressured high allowance ALJs to rule against claimants.

Expansion of own motion review would not be costless. Additional AAJs and AOs on the Council would be needed. Perhaps that expansion can be funded by some of the savings suggested elsewhere in this study.[355] Moreover, with the expansion of own motion review, post-effectuation studies could be eliminated and the savings transferred. The same analysis gleaned from post-effectuation studies could be ascertained more directly via own motion review.

Recommendation 11 – Expansion of SSA's Statistical Quality Assurance Programs: SSA apparently does not link data reporting systems so that ALJ remand rates – either by the Appeals Council or federal courts – can be more easily tracked and assessed empirically. The agency therefore has missed the opportunity to study more fully the characteristics of ALJs whose decisionmaking has been deemed deficient in one way or another at a higher rate. For instance, it may be that ALJs with greater seniority are remanded more than others,[356] ALJs utilizing video hearings may be remanded at a greater rate than those conducting traditional hearings, or that ALJs with backgrounds in

[355] The savings would come from not conducting post-effectuation studies. *See supra* Part VI.A.
[356] Some have advocated that ALJs should receive renewable terms in office, as opposed to appointments for life. *See, e.g.*, Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN L. REV. 109, 110 (1981).

litigation as opposed to positions within the agency may be remanded more. We simply do not know. Moreover, it may be that one group of judges receives more remands back from the Appeals Council but fares comparably better when their cases are appealed to federal courts. The responsible step would be for the agency to capture the information to acquire a more complete picture as to which ALJs are being remanded and reversed, whether by the Council or federal courts, and why. That information, for example, might help the agency recommend different ALJ selection criteria to OPM or might shape training initiatives. The importance of studying ALJ characteristics is highlighted by our analyses of the correlates of allowance rates. These analyses found considerable variability in both the direction and strength of correlations between case characteristics and allowance rates. For example, while the average ALJ tended to have slightly lower allowance rates in video hearings compared to non-video, this effect was found to be much stronger for some, and in the opposite direction for others.[357] Identifying which ALJs are more or less sensitive to the format of the hearing will allow for targeted training programs to reduce the observed variances.

We thus believe that SSA should attempt to correlate remand rates with attributes of ALJs, such as experience, use of video, and seniority. Of course, ALJs with very high allowance rates will receive very few remands, so the marker of percentage remanded should be evaluated in context. And, as noted before, the agency must be careful not to use a percentage-remanded rate as a lever to discipline ALJs for fear of providing incentive for ALJs to allow more claims, unless own motion review of allowances is

[357] *See* STATISTICAL APP., *supra* note 7, at 40-42. ALJs at one extreme had substantially lower allowance rates for video hearings (55% allowance rate for video hearings and 71% for non-video hearings). *Id.* at 40. ALJs at the other end of the distribution showed the opposite pattern, with an allowance rate of 75% for video hearings and 66% for non-video hearings. *Id.*

expanded significantly to reach a statistically valid sample at the individual ALJ level. Overall, however, information about which ALJs are being remanded at a greater rate can lay the foundation for more effective use of the Council in subsequent years.

D. Consideration of More Extensive Reform of the Appeals Council

Finally, we have pretermitted to this point the question whether the Appeals Council's appellate function should continue.[358] The above recommendations presuppose that the Appeals Council remains intact to consider appeals from denials of all claims. We believe that the pedagogic role of the Council is critical but are less convinced that an appeal as of right to the Council is defensible.

First, Appeals Council review adds significant time to a process that is already quite protracted. The timeframe, from filing a claim to ALJ determination, spans over a year.[359] Average disposition time at the Appeals Council level adds another year to the process,[360] doubling the wait for claimants who have appealed adverse determinations at the DDS level, many of whom are in desperate financial need. The delay in and of itself is troubling.

Second, the Appeals Council in FY 2010 issued Fully or Partially Favorable decisions in only 2.5% of the cases appealed.[361] Over 2500 claimants received disability benefits that they either would not have received otherwise,[362] or possibly only after appeal to the district court. One can assume, however, that if claimants were inclined to

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[358] This issue has been addressed before, including by the Admin. Conference of the U.S. *See* Admin. Conference of the U.S., Recommendation 87-7, A New Role for the Social Security Appeals Council, 52 Fed. Reg. 49,143 (Dec. 30, 1987).
[359] ASPECTS OF DISABILITY DECISION MAKING, *supra* note 1, at 66 fig. 61.
[360] It is also important to note that 48% of the cases processed at the Appeals Council were completed in less than 120 days in FY 2012. *See* Weight E-mail, *supra* note 167.
[361] *See id.* at 62 fig. 57, and underlying data; *see also* Astrue Testimony, *supra* note 9 (stating that just under 3% were partially or fully reversed).
[362] ASPECTS OF DISABILITY DECISION MAKING, *supra* note 1, at 62 fig. 57, and underlying data.

appeal these cases to the Council, they would appeal to the district court if the Council did not exist. The delay in court currently is roughly a year, as with an appeal to the Appeals Council, so the delay likely for claimants would not be any more protracted than it already is, putting to the side any impact on the district courts. Moreover, OGC through its gatekeeping function likely would minimize that impact by preventing many of those cases from being litigated in federal court.

Third, there is serious question as to the Council's current effectiveness in screening cases before they reach court. OGC seeks consent from the claimant for a voluntary remand in approximately 15% of all cases appealed to the federal courts.[363] That OGC is unwilling to defend in federal court 15% of cases that the Appeals Council affirms (or declines to review) itself suggests gaping holes in the system.

There is other evidence that the Council's review itself is far from complete. It is not difficult to provide troubling examples. In *Coleman v. Astrue*,[364] for instance, the ALJ denied benefits for a claimant suffering epileptic seizures.[365] The testimony from two different medical experts ("MEs"), which was contradictory, is almost beside the point. The ALJ convened a hearing on February 15, 2005, and the ALJ called an SSA-provided ME who agreed with the treating physician's statements that the claimant could only control his epilepsy with large doses of medication that made him unfit for work.[366] Without explanation, the ALJ scheduled a second hearing, which convened on July 1,

[363] *See* Forbes E-mail, *supra* note 56.
[364] 2007 WL 2298377 (N.D. Ill. Aug. 3, 2007).
[365] Id. at *1.
[366] *Id.* at *3.

2005.[367] This time, a different ME testified that the need for medication would not prevent the claimant from working in a number of jobs in the economy.[368]

The ALJ relied on the second ME and denied the claim.[369] In reaching the decision, the ALJ *never* mentioned the first hearing, let alone justified why a second hearing was necessary, and therefore never even attempted to discredit the first ME's opinion that supported disability.[370] The Appeals Council denied the claimant's request for review.[371] SSA subsequently attempted to justify the ALJ's decision in federal court on the ground that the glaring procedural improprieties were of no moment and that the ALJ *might* have ignored the first ME's testimony for a number of legitimate reasons.[372] Not surprisingly, the court reversed.[373] It is difficult to understand not only how an ALJ could have resolved *Coleman* in the way that he did, but also how the Appeals Council let the decision stand.

For a perhaps more typical example, consider the district court's decision in *Larlee v. Astrue*.[374] In that case, the ALJ rejected claimant's testimony of disabling pain from fibromyalgia.[375] In so doing, the ALJ stated that claimant's testimony of disabling pain was "not entirely credible to the extent alleged in view of the medical evidence and clinical findings[,] as well as claimant's own testimony."[376] The court noted that the ALJ not only failed to articulate why he discredited the claimant's subjective testimony of

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[367] *Id.*
[368] *Id.* at *4.
[369] *Id.*
[370] *Id.* at *6.
[371] *Id.* at *1.
[372] *Id.* at *7. SSA's argument ignored the *Chenery* doctrine's central tenet that a reviewing court can only review the justifications underlying an agency's decision relied upon by the agency at the time it made its decision. *See* SEC v. Chenery, 318 U.S. 80 (1943).
[373] *Coleman*, 2007 WL 2298377 at *10.
[374] 694 F. Supp.2d 80 (D. Mass. 2010).
[375] *Id.* at 81, 86.
[376] *Id.* at 86 (quotations omitted).

pain, but that he failed as well to make findings "sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statement and the reason for that weight."[377] Indeed, social security rulings require such specificity and provide a roadmap to ALJs evaluating subjective evaluations of pain.[378] The ALJ examined only one of the six factors mandated by SSA in determining whether to discredit testimony of pain.[379] The Appeals Council twice had the opportunity to remedy the deficiencies in the ALJ reasoning in the case and declined, despite the ALJ's failure to follow SSA guidelines.[380] The district court ordered immediate payment of the claim instead of remanding the case in light of the prohibitive delay.[381]

In the absence of the Appeals Council, claimants would be forced to appeal adverse decisions to the district court, which would be more expensive to litigate on both sides than the paper hearings before the Appeals Council. From a claimant's perspective, however, the prospect of fees under the Equal Access to Justice Act ("EAJA")[382] in lieu of the fees from the benefits owed (capped at $6000)[383] should provide incentive to find representation for an appeal in close cases. There is no question but that staff in OGC would need to expand to handle the additional cases, but it is possible that, after

[377] *Id.* (quotations omitted).
[378] *See* SSR 96-7p ("It is not sufficient for the adjudicator to make a single, conclusory statement that 'the individual's allegations have been considered,' or that 'the allegations are not credible.' . . . The determination or decision must contain specific reasons for the finding on credibility."). Soc. Sec. Admin, Policy Interpretation Ruling Titles II and XVI: Evaluation of Symptoms in Disability Claims: Assessing the Credibility of an Individual's Statements, *reprinted in* 61 Fed. Reg. 34,483 (July 2, 1996).
[379] *Larlee*, 694 F. Supp.2d at 86.
[380] *Id.* at 81-82.
[381] *Id.* at 87.
[382] 28 U.S.C. § 2412(d)(1)(A) (2013) (authorizing the "award [of attorney's fees] to a prevailing party [in a suit against the United States] unless the court finds that the position of the United States was substantially justified").
[383] Soc. Sec. Admin., Maximum Dollar Limit in the Fee Agreement Process; Notice, 74 Fed. Reg. 6080 (Feb. 4, 2009).

reviewing the files, OGC might settle quickly at least in cases for which the Appeals Council currently either reverses or remands. Unquestionably, altering the Appeals Council's role would also result in an increased number of Social Security disability case filings in federal district courts, and, thereby, potentially disrupt the federal court system.[384]

Currently, given that the Appeals Council affirms denials in almost 100,000 cases a year, only a modest percentage of claimants appeal denials to federal court, whether because of weakness in their cases or lack of perseverance. Claimants drop their cases for a variety of reasons. Some may not be able to find an attorney. Others may drop appeals to file a new claim for a subsequent period because the evidence has improved.[385] Predicting the number of appeals to federal court if the Appeals Council no longer hears cases as of right accordingly is quite difficult, but the federal courts' potential exposure would be significant.

Any influx of appeals likely would be unwelcome by federal courts. Social Security disability cases may not take nearly as much time as a typical civil case to resolve in court, but the sheer volume of cases would increase. U.S. magistrates may struggle to keep up with the increased volume. Although it is hard to predict with

[384] SSA recently experimented with removing the Appeals Council, replacing it with the Decision Review Board ("DRB"). The DRB has since been eliminated, in part, because "[t]he DRB's workload [grew so] quickly [to] become overwhelming." Soc. Sec. Admin., Reestablishing Uniform Nat'l Disability Adjudication Provisions; Notice of proposed rulemaking, 74 Fed. Reg. 63,688, 63,689 (Dec. 4, 2009). Often, the DRB could not review its cases and would simply certify them to federal court. *See, e.g.*, Grouzis v. Astrue, 2012 U.S. Dist. LEXIS 136489, *1 (D. Mass. Sept. 25, 2012) (noting that a case before the court was ripe for judicial review after finding that an ALJ's decision became the final decision of SSA when the DRB failed to complete its review of the plaintiff's claim in the time allowed); Johnson v. Astrue, 2012 U.S. Dist. LEXIS 135077, *1 (D. Mass. Sept. 21, 2012) (same); Marques v. Astrue, 2012 U.S. Dist. LEXIS 29143, *2 (D. Mass. Mar. 6, 2012) (same); Roeschlaub v. Astrue, 2011 U.S. Dist. LEXIS 153939, *3 (D. Mass. Dec. 5, 2011) (same).

[385] Kraus Interview, *supra* note 348.

confidence, the caseload of social security claims in the district courts would increase significantly even if we posit an expanded role for OGC.

We tentatively believe that altering the Appeals Council focus to quality control as opposed to appellate review as of right is warranted. The appellate review function does not justify the added delay to often deserving claimants and the increased administrative costs attendant upon resolving in excess of a 100,000 appeals each year.

Recommendation 12 - Adoption of Appeals Council Audit Function: The Appeals Council should adopt an audit function by reviewing a sampling of both allowances and denials, without reviewing each denial appealed as it currently does.[386] If the Appeals Council reviewed 5% of each ALJ's decisions, ALJs would have greater incentive for care in writing decisions both allowing and denying benefits. The Council could couple that review with a certiorari policy in which it could opt to review any other denial for good cause shown. The Council could accept review because of the policy issues involved or because of the egregiousness of the ALJ's error. The overall caseload of the Council likely would decrease, permitting the Council more time to focus on decisions clarifying policy, assuming judicious use of the discretionary review power.

By reviewing 5% of each ALJ's workload, the Council could more readily determine if additional training were needed, as the Appeals Council currently does in a more modest fashion through post-effectuation review. Although the Appeals Council only would consider appeals from a portion of denials automatically, there is to our knowledge no agency that guarantees plenary appellate review of an ALJ's

[386] This proposal is somewhat akin to the DRB model that SSA abandoned in Region I but with the critical difference that the Council would adopt an audit function coupled with the authority to review appeals on a discretionary basis. The Council therefore maintains the keys to its own workload. *See* IMPROVING THE HEARING PROCESS, *supra* note 13, at 16-17; *see also* SSA HAS TAKEN STEPS, *supra* note 62, at 11-12.

determination. As Justice Powell articulated in *Mathews v. Eldridge*, "Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited."[387] The key would be to devise a way to handle the additional cases in the district courts without overburdening the court system.[388]

Thus, we recommend a pilot project in one SSA region to eliminate automatic Appeals Council review of denials in an effort to study further the Appeals Council's transition from an appellate body to more of a policy entity. The Appeals Council should examine a sampling of denials and allowances from all ALJs in that region and determine on a discretionary basis which appeals from denials seem most compelling for review. OGC should accordingly heighten its screening function for appeals arising from that region. After two years of experience, a final decision could be made whether to reinstate the Council's traditional appellate review function, or eliminate it nationwide. The additional burden on federal courts would need to be assessed and various responses weighed. In the interim, the Council should adopt the more modest reforms suggested to help facilitate its pedagogic role.[389]

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[387] 424 U.S. 319, 348 (1976).

[388] SOC. SEC. ADMIN. OFFICE OF THE INSPECTOR GENERAL, OVERALL DISABILITY CLAIM TIMES FOR 2009, A-01-10-10168, at 8 (May 2011), *available at* http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-01-10-10168.pdf [hereinafter CLAIM TIMES FOR 2009] (reporting that in FY 2009, the average disability case was not resolved for 1895 days, from filing to federal court decision).

[389] *See infra* Part VI.C. We hope to study disparities among federal court judges at a later date. The variation in remand rates suggests that federal judges as well as ALJs harbor different notions of disability. The asymmetrical nature of the SSDI and SSI adjudication system, under which claimants but not the agency can appeal adverse ALJ decisions, may lead to excessively strict district court review of the many ALJ decisions that deny disability. OGC must understand its burden in this unbalanced system to present to federal judges an understanding of the decisions that are not appealed. For instance, attorneys can cite statistics such as of the 100,000 cases each year based on mental impairments, 50,000 are allowed, or of the 20,000 cases in which the testimony of two treating physicians conflict, disability is allowed in 25% of the

VII. DDS RECONSIDERATION LEVEL

Although not within the scope of our original study mandate, we noted an unexpected finding in our data worthy of additional consideration. In 40 states, individuals whose claims are denied at the initial DDS level have a right to seek reconsideration. In those non-prototype states, a team, including a disability examiner and a medical or psychological consultant, none of whom was involved in the first case, reviews the claimant's case. The team does not defer to the initial disability determination. Reconsideration added over 100 days to the review process,[390] and the allowance rate at the reconsideration level is 14%.[391] Roughly a quarter of those whose claims are denied at the reconsideration level drop their appeal.[392]

We examined whether appeals to ALJs from cases arising in the 10 prototype states that eliminated reconsideration were resolved at a similar rate as for appeals from denials in states that permitted the reconsideration option. Given that the reconsideration level results in allowances to 14% of claimants and that an additional 25% or so of disappointed claimants do not appeal after reconsideration, one might surmise that ALJs would allow a higher percentage of claims in cases arising from the prototype states because there would be more deserving claims. Our data reveal the opposite – Fully Favorable rates for claims reviewed by ALJs from prototype states (*i.e.*, no reconsideration) were in fact lower than for non-prototype states (*i.e.*, reconsideration

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cases and so on. In that vein, judges may reflect a little longer before remanding a case for further deliberation.

[390] *See* CLAIM TIMES FOR 2009, *supra* note 388, at 3.

[391] *See* SOC. SEC. ADMIN. OFFICE OF THE INSPECTOR GENERAL, CONGRESSIONAL RESPONSE REPORT: REINSTATEMENT OF THE RECONSIDERATION STEP IN THE MICHIGAN DISABILITY DETERMINATION SERVICES, A-01-10-20153, at 7 (2010), *available at* http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-01-10-20153.pdf [hereinafter REINSTATEMENT OF THE RECONSIDERATION STEP IN MICHIGAN].

[392] *Id.*

permitted).[393] We calculated a 3% differential.[394] That finding is counter intuitive. The reconsideration level, in other words, did not screen out a sufficient number of cases to alter the mix of claims on appeal to ALJs.[395]

The data collected therefore suggest that the DDS reconsideration level may not filter out sufficient errors to justify the cost and delay.[396] It is possible that ALJ determinations are so random that the allowance rates would remain the same no matter the pool of cases appealed to the ALJs. Or, it may be that claimants decide to appeal to ALJs in roughly the same percentage, whether or not reconsideration is an option, because of factors not directly linked to the strength of their cases. But, we think it far more likely that, had the reconsideration level significantly caught mistakes, the number of appeals from the states would be smaller or the percentage of allowances much less.

On the other hand, at each level of the disability adjudication process – DDS, reconsideration, ALJ, Appeals Council, and federal court – a substantial number of claimants drop their cases.[397] In other words, the levels of appeal provided by SSA may not only weed out weak claims but also may provide disincentive for claimants to continue the process. In particular, the reconsideration level may be more successful in deterring appeals to ALJs than it is in catching mistakes at the DDS level.

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[393] Our finding is similar to the sample study conducted by the Inspector General. *See* CLAIM TIMES FOR 2009, *supra* note 388, at app. F.

[394] STATISTICAL APP., *supra* note 7, at 50-52. The interpretation of the difference in Fully Favorable rates is complicated by the higher dismissal rate for prototype states (18%) than for non-prototype states (14%). *Id.* Considering only cases where a decision was reached (*i.e.*, excluding dismissals), the Fully Favorable rate was 58% in prototype states and 59% in non-prototype states. *Id.*

[395] This trend may be in part due to other differences between prototype and non-prototype states. *Id.* In particular, hearings from prototype states are more likely to involve Title XVI claims, and to be held without a claimant representative; both of which we found to be correlated with lower allowance rates. *Id.* at 50-51. After controlling for these factors, claims from prototype states showed slightly *higher* allowance rates (2%) than claims from non-prototype states. *Id.*

[396] The SSA calculated roughly the same differential for claims filed in FY 2008. ASPECTS OF DISABILITY DECISION MAKING, *supra* note 1, at 17.

[397] SSAB data show that the attrition from initial denial at the DDS level to appeal is significantly greater in the prototype states. *See id.*

Recommendation 13 - Considerations for SSA to Evaluate Before Reinstitution of Reconsideration in Prototype States: Accordingly, we suggest that the agency should hesitate before reinstituting the reconsideration level in the prototype states.[398] Eliminating reconsideration at the DDS level saves resources and minimizes the time between determination at the state level and possible appeal to the ALJ. The reconsideration level dissuades both deserving and undeserving claimants from pursuing their cases. Accordingly, SSA should calculate the cost in added appeals to the ALJ level in the prototype states but balance that cost against the prospect that deserving beneficiaries are not receiving their due.

VIII. CONTINUING DISABILITY REVIEW

Although the study was designed to improve the role of the Appeals Council and streamline the ALJ hearing process, an issue arose during the course of interviews that warrants priority attention, even though it is outside the scope of the original study mandate. The hearings backlog and difficulty of using ALJ decisions as baselines to determine medical improvement have impaired functioning of the CDR system as designed. The delays in hearings cause substantial loss to the trust fund because payments continue to beneficiaries who are no longer disabled,[399] and that loss threatens availability of funds down the road to claimants who are disabled.

The Social Security Act requires the agency to conduct periodic review of the well over ten million beneficiaries to ensure continuing eligibility for benefits.[400] The agency evaluates certain criteria in determining which cases to pull for CDR. It bases the

[398] SSA had considered reinstating reconsideration in Michigan. *See generally* REINSTATEMENT OF THE RECONSIDERATION STEP IN MICHIGAN, *supra* note 391.
[399] *See* Soc. Sec. Disability Reform Act of 1984, Pub. L. No. 98-480, § 423, 98 Stat. 1794; Pub. L. No. 97-455, § 213(g)(2)(A), 98 Stat. 2497 (1983) (codified at 42 U.S.C. § 1395(g)(2)(A)).
[400] *See* 42 U.S.C. §§ 421(i), 1382(a)(3)(H)(ii)(I); Swank, *supra* note 200, at 166.

evaluation on beneficiary characteristics contained in SSA's computerized records, such as age, impairment, and length of disability.[401] SSA places beneficiaries in three categories – medical improvement expected, medical improvement possible, and medical improvement not expected.[402] Full medical reviews generally are required every 18 months in the first category, and paper reviews are initiated for every beneficiary within three years in the second category and five to seven years for those not expected to improve.[403] Based on the paper reviews of medical information, the agency at the DDS level then determines whether there is sufficient evidence of improvement to end benefits or at least schedule a medical CDR.[404]

In FY 2010, SSA completed 324,567 full medical CDRs, finding that benefits should be ended in 84,574 cases, principally due to perceived medical improvement (roughly 25% of cases selected).[405] It predicted that benefits ultimately would be terminated in over 50,000 cases.[406] On the other hand, the IG has reported that 1.4 million CDRs were expected to be pending at the end of FY 2011[407] and the agency

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[401] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-662, SOCIAL SECURITY DISABILITY: REVIEWS OF BENEFICIARIES' DISABILITY STATUS REQUIRE CONTINUED ATTENTION TO ACHIEVE TIMELINESS AND COST EFFECTIVENESS 7 (2003) [hereinafter REVIEWS OF BENEFICIARIES' DISABILITY STATUS]; SOC. SEC. ADMIN. OFFICE OF THE INSPECTOR GENERAL, FULL MEDICAL CONTINUING DISABILITY REVIEWS, A-07-09-29147, at 2 (2010), *available at* http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-07-09-29147.pdf.

[402] REVIEWS OF BENEFICIARIES' DISABILITY STATUS, *supra* note 401, at 7.

[403] *See* SOC. SEC. ADMIN., ANNUAL REPORT OF CONTINUING DISABILITY REVIEWS FISCAL YEAR 2010, at 2 (2012), *available at* http://www.ssa.gov/legislation/FY%202010%20CDR%20Report.pdf [hereinafter FY 2010 CDR REPORT].

[404] *See* Soc. Sec. Admin., POMS § DI 28001.015-Kinds of Events That May Initiate a CDR (Mar. 12, 2012), *available at* https://secure.ssa.gov/poms.nsf/lnx/0428001015.

[405] FY 2010 CDR REPORT, *supra* note 403, at 1.

[406] *See id.*

[407] SOC. SEC. ADMIN. OFFICE OF THE INSPECTOR GENERAL, OFFICE OF AUDIT WORK PLAN FY 2012 at 13 (Oct. 2011), *available at* http://ssaoigstg.prod.acquia-sites.com/sites/default/files/audit/full/pdf/FY%202012% 20Audit%20Plan_0.pdf [hereinafter AUDIT WORK PLAN]; *see also* FY 2010 CDR REPORT, *supra* note 403, at 7; SOC. SEC. ADMIN. OFFICE OF THE INSPECTOR GENERAL, FOLLOW-UP, CHILDHOOD CONTINUING DISABILITY REVIEWS AND AGE 18 REDETERMINATIONS, A-01-11-11118, at 3 (2011), *available at* http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-01-11-11118_0.pdf.

conducted more CDRs ten years ago than it does today.[408] In addition to problems of delay,[409] the agency's success rate may be limited because if the evidence girding the initial disability finding is conclusory, SSA's burden to show improvement is daunting. Each beneficiary whom the agency determines has improved to the point of resuming gainful employment is entitled to a hearing before an ALJ.[410]

The $300,000 average cost over a lifetime for finding disability (including benefits and health coverage)[411] would diminish significantly if claimants whose condition improved were removed from the rolls, although there is no guarantee that such individuals would resume work.[412] SSA studies have suggested that, for every dollar spent on CDRs, the government saves almost ten dollars.[413] At some point, that ratio would flatten out, but, in the meantime, there is substantial ground to be gained.

There are a number of reasons plausibly to explain why the agency has not been more aggressive in CDR. First, the legacy of the 1980s – when the agency apparently forced a substantial number of individuals with disabilities off the rolls, precipitating scathing rebukes from the federal judiciary – may continue to influence the agency.[414]

Second, Congress and/or the agency understandably may not wish to appear as if it is targeting people with disabilities. Those receiving disability benefits largely are poor, even if they have recovered from their illness or injury, and they may face difficulty

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[408] *See* ASPECTS OF DISABILITY DECISION MAKING, *supra* note 1, at 18.
[409] For additional data documenting delay, *see* Swank, *supra* note 200, at 166-68.
[410] *See* 20 C.F.R. § 404.1594 (2006). SSA also conducts reviews to ensure that beneficiaries are not earning in excess of permitted amounts. *See* 20 C.F.R. § 404.1589 (1986).
[411] *See* Paletta, *supra* note 2.
[412] Only a modest number of beneficiaries ever return to work once on disability. *See* RICHARD V. BURKHAUSER & MARY C. DALY, THE DECLINING WORK AND WELFARE OF PEOPLE WITH DISABILITIES 58-67 (2011).
[413] *See* ASPECTS OF DISABILITY DECISION MAKING, *supra* note 1, at 21; FY 2010 CDR REPORT, *supra* note 403, at 6.
[414] *See, e.g.*, Levy, *supra* note 11, at 484–89; Robert E. Rains, *A Specialized Court for Social Security? A Critique of Recent Proposals*, 15 FLA. ST. U. L. REV. 1 (1987) (summarizing spate of wrongful terminations and adverse reaction in the courts).

in finding gainful work, particularly in our current economy. SSA over the years, therefore, may have shifted priorities to preventing those who are not disabled from receiving insurance benefits at the outset.[415]

Third, Congress simply may not have the will to increase funding for an agency that addresses entitlements, even if the funds are targeted at saving money.[416] There may be insufficient political backing to allocate more money for SSA CDR review.

A procedural innovation would help address the backlog and yet comport with the underlying goal of the Social Security Act to ensure that those who are disabled receive benefits. Congress could reverse the presumption of disability for those most likely to recover by altering the statute to allow a finding of disability for a discrete term.[417] A significant number of claimants may suffer traumatic injury through an automobile crash, fall, or disease. Their disability is not in question, but the likelihood of recovering to the point of gainful employment may be substantial. SSA may not be able to gauge whether a particular disability likely will last another two or four years, but it can be reasonably confident that it will not extend beyond that period. Currently, SSA only has the option to conclude that such individuals are disabled, with benefits to continue until the agency can bear the burden to determine that the disability has ceased. And, for reasons previously suggested, the CDR process as currently constituted is not fully effective, both because of delay and the inadequacies of the ALJ decision allowing benefits.

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[415] SSA in addition may not wish to precipitate more requests for hearings, which would threaten to increase the backlog. *See* Swank, *supra* note 200, at 169.
[416] *See* FY 2010 CDR REPORT, *supra* note 403, at 7.
[417] Similar proposals have been issued periodically, but never come close to implementation. *See, e.g.*, CONG. BUDGET OFFICE, CBO MEMORANDUM: TIME-LIMITING FEDERAL DISABILITY BENEFITS (1997), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/40xx/doc4013/1997doc02-entire.pdf.

The "term disability" concept would change the dynamic of CDRs in four respects. First, term beneficiaries once again would have the burden of persuasion to demonstrate disability at the end of the term, as with claimants generally. It is difficult to assess what difference that change in burden would make, but it would, at a minimum, set a different "tone" at hearings to determine whether the predicted medical improvement occurred. The shift in burden likely will result in more accurate determinations both because recovery was predicted and because the underlying ALJ opinion allowing benefits often is ambiguous. Moreover, because the beneficiary uniquely has access to information on whether the predicted recovery materialized, shifting the burden accords with traditional justifications for allocating burdens.[418] Second, cabining disability for a term may have the heuristic value of communicating to claimants that they should continue thinking about employment possibilities even when collecting benefits. Third, the burden of overcoming inertia would switch from agency to beneficiary. Under current policy, it is the agency that must schedule the CDRs, collect medical information, and then determine whether to terminate benefits. Under the "term" proposal, beneficiaries must initiate the process, and some beneficiaries whose health has improved might well desist.[419] Fourth, and related, the term disability approach would minimize the protracted delays that currently beset the CDR process before SSA determines that beneficiaries are no longer disabled, and therefore minimize government

[418] *Cf.* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477 (1999); Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413 (1997).

[419] Indeed, a significant number of beneficiaries, several thousand a year, when contacted by SSA do not comply with SSA's request to provide medical updates and therefore are terminated from the rolls for that reason. FY 2010 CDR REPORT, *supra* note 403, at 3.

overpayments.[420] For a mixture of reasons, therefore, a procedural shift to the term disability concept likely would help ensure that payments are confined to those who remain disabled.

Recommendation 14 - Amendment of the Social Security Act to Include "Term" Disabilities: Accordingly, Congress should amend the Social Security Act to give the agency the option to determine disability for a term, with the ability to choose between three and five years. After that time, the claimant would have to demonstrate continuing disability based on current medical information. To the extent that the disability lasts longer than predicted by the ALJ, claimants will have the former findings made by the ALJ in their favor and need only supplement the record with contemporary physician reports. SSA should consider an age cutoff for such term-limited allowances, such as 55, given that the likelihood of reentering the workforce for a claimant who is disabled and close to retirement age is minimal. Moreover, ALJs should only be able to decide upon a term disability once per claimant. Thereafter, the choice would become binary, as it is now – either the claimant is disabled or not. Otherwise, ALJs might be too tempted to impose one term after the next and trigger too many new hearings.

ALJs are not physicians, and even physicians have no crystal ball in prognosticating the length of disability. But, through hearing 500-700 cases annually, ALJs develop a sense of how long particular traumatic injuries are likely to continue, and they have the medical reports at hand. A part of their caseload each year includes CDRs, so they have experience in assessing the duration of disability. Given that ALJs see claimants well after the injury has taken place, they gain a sense as to the pace of

[420] AUDIT WORK PLAN, *supra* note 407, at 13 (estimating that, from calendar year ("CY") 2005 through CY 2010, SSA "will have made benefit payments of between $1.3 and $2.6 billion that could have been avoided if the medical CDRs in the backlog had been conducted by DDSs when they were due").

recovery. SSA already calculates the likelihood of recovery based upon sophisticated analytics, which should aid ALJs in their determination. Claimants should be protected by continuing to receive benefits for a period after expiration of the term to enable them to pursue disability again at the DDS level by filing a new application.

Adoption of the finite disability concept would not be cost free. SSA would face more hearings as beneficiaries challenge whether they have improved significantly at the end of their designated term. For the sake of discussion, assume that ALJs determine that 50,000 claimants a year fall within the term disability category, or roughly 7% of all those turned down at the DDS level who seek a hearing before an ALJ.[421] If all 50,000 later challenge whether they are still disabled at the end of the term, which is unlikely, SSA would face a 7% increase in filings. Given that some term beneficiaries are likely not to re-file, some will gain disability at the DDS level, and that the claims of some would have been remanded anyway, the increase in hearings annually at the ALJ level would be significantly less.

The impact of even that increase in hearings is not to be minimized. Nonetheless, most of the additional cases would turn on disabilities already documented in the record. If the claimant loses at the DDS level and appeals, the hearing would be relatively straightforward given that the only issue for resolution would be medical improvement, unless a new disability were implicated.

More importantly, if 50% of those 50,000 claimants are found to have improved to the point that they are no longer disabled (in conformance with ALJ predictions) – a

[421] The CBO in 1997 estimated that as many as 50% of claimants fall within a category of possible improvement. TIME-LIMITING FEDERAL DISABILITY BENEFITS, *supra* note 417, at 2. We recommend that the disability term category be used only for claimants who are "likely" to improve.

relatively modest assumption[422] – then the lifetime savings to the trust fund would, in crude arithmetic, approach 7.5 billion dollars (25,000 claims at $300,000 each, discounted somewhat by disability payments distributed during the term). And, these savings would arise *each* year, although the savings would only hit the trust fund over an extended period of time. Of course that figure does not take into account that SSA eventually may determine through the current CDR process that many of those beneficiaries are no longer disabled. The "term disability" concept, however, would force reconsideration of disability much sooner than is now the case, and the IG has estimated that even the delay – without considering any impact of the changes from reallocating the burden of persuasion – would save hundreds of millions of dollars each year.[423] In contrast to such savings, the additional process costs assumed by SSA seem quite modest in comparison.

On the other hand, if the option of a "disability term" existed, it is possible that ALJs in close cases would allow *more* claims than they do now, because the government's exposure is less. Although the criteria for determining disability would not have changed, an ALJ's sympathies might be determinative in close cases. The possibility should be monitored closely, but a quick arithmetic look suggests that the

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[422] SSA has found roughly 6% of those subjected to CDR routine review to be no longer disabled. *See* FY 2010 CDR REPORT, *supra* note 403; David H. Autor & Mark G. Duggan, *The Growth in the Social Security Disability Rolls: A Fiscal Crisis Unfolding*, J. ECON. PERSPECTIVES (2006). That percentage has remained constant. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/T-HEHS-97-222, SSA IS MAKING PROGRESS IN ELIMINATING CONTINUING DISABILITY BACKLOGS (1997).

[423] *See* SOC. SEC. ADMIN. OFFICE OF THE INSPECTOR GENERAL, FULL MEDICAL CONTINUING DISABILITY REVIEW, A-07-09-29147, at 2-3 (Mar. 2010). Indeed, the amount saved may be greater; *see also* AUDIT WORK PLAN, *supra* note 407, at 13 (estimating that from calendar year ("CY") 2005 through CY 2010, SSA "will have made benefit payments of between $1.3 and $2.6 billion that could have been avoided if the medical CDRs in the backlog had been conducted by DDSs when they were due"). Moreover, SSA calculates that 6% of the 1.25 million beneficiaries whose cases currently are in the CDR backlog are no longer disabled. *See* FY 2010 CDR REPORT, *supra* note 403. If those CDRs could be scheduled, therefore, the agency stands to recoup over one billion dollars (70,000 claims at $15,000 a year) a year until they can catch up on their docket.

increase in the allowance rate would have to be substantial before the long run savings would be eliminated.[424]

Finally, we are inclined to make an agency decision as to a "term disability" nonappealable. Claimants in that category will be receiving benefits for at least the next three years, and have the option to file for disability at that time if their condition has not improved. This is not to minimize the interest of the claimant in an uninterrupted flow of benefits, but we doubt that federal court judges would favor an increase in their workload based on the argument that SSA mispredicted the likelihood that claimant's condition will change over time.

In short, the absence of a disability term results in payment of benefits to beneficiaries who are no longer disabled. Congress should authorize ALJs to find that claimants' disability is expected to continue, but that is not likely to continue past a period of three or five years. After that time, claimants would once again have the burden to demonstrate disability. Although many readily could prove continuing disability, a significant percentage could not due to the expected improvement in condition.

[424] Ultimately, the term disability concept could be applied at the state DDS level as well.