

**STATEMENT OF  
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VICE CHAIR, SOCIAL SECURITY SECTION  
OF THE  
FEDERAL BAR ASSOCIATION**

**ON  
CLEARING THE BACKLOG --  
GIVING THE SOCIAL SECURITY ADMINISTRATION  
THE RESOURCES IT NEEDS  
TO PROVIDE THE BENEFITS WORKERS HAVE EARNED**

**BEFORE THE  
COMMITTEE ON WAYS AND MEANS  
U. S. HOUSE OF REPRESENTATIVES**

**APRIL 23, 2008**

Chairman Rangel, Ranking Member McCrery and Members of the Committee:

I am Rick Waitsman, Vice Chair of the Social Security Section of the Federal Bar Association. I am an Administrative Law Judge in the Office of Disability Adjudication and Review of the Social Security Administration in its Atlanta North office. As an Administrative Law Judge at SSA for the past fourteen years, I have heard and decided well over 8,000 appeals. I also have served in the management positions of Assistant Regional Chief Administrative Law Judge for Region IV-Atlanta and Administrative Law Judge in Charge of the Medicare Division. I have served in three hearing offices.

I am very pleased to be here today representing the Social Security Section of the Federal Bar Association (FBA). My remarks today are exclusively those of the Social Security Section of the Federal Bar Association, and do not necessarily represent the views of the FBA as a whole. Moreover, my remarks are not intended to, nor do they necessarily reflect, the views of the Social Security Administration.

Thank you for convening this hearing on a matter of critical importance to the federal government's delivery of effective services to the American people. As you know, the Federal Bar Association is the foremost professional association for attorneys engaged in the practice of law before federal administrative agencies and the federal courts. Sixteen thousand members of the legal profession belong to the Federal Bar Association. They are affiliated with over 85 FBA chapters in many of your districts. There are also more than a dozen sections organized by substantive areas of practice, such as the Social Security Section.

Unlike other organizations associated with the Social Security disability practice that tend to represent the narrow interests of one specific group, the Federal Bar Association's Social Security Section embraces all attorneys involved in Social Security disability adjudication. Our members include:

- Attorney Representatives of claimants
- Administrative Law Judges (ALJs)
- Administrative Judges at the Appeals Council
- Staff Attorneys at the Office of Disability Adjudication and Review
- Attorneys at the Social Security Administration's Office of General Counsel
- U.S. Attorneys and Assistant U.S. Attorneys
- U.S. Magistrate Judges, District Court Judges and Circuit Court Judges

The common focus of the FBA's Social Security Section is the effectiveness of the adjudicatory process primarily with hearings in the Office of Disability Adjudication and Review (ODAR), the appeal process at the Appeals Council, and judicial review in the federal courts. Our highest priority is to assure the integrity, independence, fairness, and effectiveness of the Social Security disability hearing process for those it serves -- both Social Security claimants themselves and all American taxpayers who have an interest in assuring that only those who are truly disabled receive benefits.

We appreciate the concern that was expressed by this Committee and the Social Security Subcommittee that resulted in the Commissioner's withdrawal of proposed rules that would have reduced the due process rights of claimants and cut disability benefits by two billion dollars. We strongly believe that the disability appeals backlog has not grown out of an excess of due process. While there should be a constant quest to improve the disability program, reforms should not arise out of procedural roadblocks that cannot be navigated by claimants.

Furthermore, it is the Section's collective view that the Social Security disability program is under considerable strain. Current delays in the processing of claims are unacceptable. The Federal Bar Association previously urged Congress to increase funding for fiscal year 2008, and we applaud the Congress for appropriating funds in excess of the President's request.

We thank the Ways and Means Committee for holding this hearing and for shining the spotlight on this unconscionable problem and the harm endured by hundreds of thousands of claimants who continue to wait for years to receive a final agency decision on their disability claim. During the painful wait, some appellants have lost their homes, others have been deprived of medical care and necessary medication, some have undergone bankruptcy, while others have suffered even the loss of custody of their children, and in perhaps the most tragic of cases, suffered from depression so severe that it has resulted in suicide. Sadly, it is no longer unusual to review a disability claim at the hearing level in which the claimant has died from the disabling impairment or taken one's life from the stress of lack of resources, without the benefit of temporary assistance from the Social Security Administration.

I serve in the Atlanta North hearing office that was profiled in the February 2008 CBS Evening News Report on the hearing backlog. ALJs and appellant representatives who are members of the FBA's Social Security Section agree that the CBS report was an accurate depiction of the lives of those who await final agency decisions in the Atlanta North office, as well as other offices dealing with long waits. Some statistics about my office and its caseload illustrate the crisis at ODAR. The Atlanta North office started fiscal year 2003 with 3,104 pending cases and during that year disposed of 3,624 cases with an average processing time of 302 days. In that same year, we successfully reduced the number of cases pending. However just 4 years later, at the start of 2007, our caseload had grown to 10,490 cases. And though we disposed of a record number of cases, our pending caseload continued to grow to 11,922 cases. That's why our processing time for 2007 jumped from 302 days to 751 days, despite a record-breaking number of decisions for the office and its ALJs. The backlog in fact would have skyrocketed even more had the Atlanta North Office not transferred over 1,000 cases to other offices. While productivity issues can take their toll, the influx of new cases without additional resources was the foremost cause of waits for claimants. During this rapid growth in cases, we were able to dispose of about 2 cases per ALJ per day, but received about 4 cases per ALJ per day.

When fiscal year 2008 began, the Commissioner of Social Security gave the Atlanta North office a numerical goal for the number of case dispositions relative to the size of our ALJ and support staff. The Commissioner's national goal was to dispose of all cases that had remained pending at ODAR for 900 or more days. Yet if we met our numerical goal, we still would not have disposed of enough cases to have eliminated our 900 day-old cases because we had more 900 day-old or older cases than our disposition goal. The goal did not even take into account claimants entitled to expedited case handling, such as Veterans from Iraq and Afghanistan, terminal illness cases, dire need, on the record requests, and court and Appeals Council remands.

In the starkest and simplest of terms, we do not have the resources locally to handle the cases we are assigned. The Commissioner is providing help by sending in visiting ALJs, utilizing their support staff and permanently transferring cases to other offices. But these measures by themselves are insufficient. The bottom line is that SSA sorely needs a substantial increase in its funding so that meaningful justice can be promptly and fairly delivered to the hundreds of thousands of disability claimants who await an answer to their appeals.

Social Security has an expression, "Put a Face to the Case." We are not dealing with just numbers or files, but real people and real lives. Social Security at all levels has a dedicated workforce. It simply doesn't have enough employees to do the job the public expects and deserves. It should be emphasized that the issue is the length of time claimants must wait to receive a final agency decision. While the solution involves studying all steps of the process, we should not lose sight of the fact that in addition to the hearing backlog, the claimant waits approximately 103 days for an initial decision and 242 days for the Appeals Council. Approximately, 40 states provide a reconsideration step after an initial denial which results in additional delays. In previous testimony, the Social Security Section of the Federal Bar Association has urged that reconsideration be eliminated because the few cases that are approved do not justify the delay and expense. Notwithstanding that recommendation, additional funding is needed to increase the speed and accuracy of all stages of the application and appeal process.

The Commissioner is faced with a daunting task and limited resources. He has developed a number of initiatives to reduce the backlog in offices with longer processing times. We have seen some of these initiatives result in progress and congratulate him on these successes. However, we believe even more can be accomplished with fiscal year 2009 funding in excess of the President's request.

Therefore we offer the following six recommendations:

- 1. SSA Should Continue to Hire Administrative Law Judges and Fully Staff Hearing Operations**
- 2. SSA Should Continue to Fully Implement the Electronic Disability Process (eDIB)**
- 3. SSA Needs to Fund Capital Expenditures to Add New Hearing Offices and Permanent Remote Sites**

- 4. SSA Should Test Initiatives Before Full Implementation and Not Count on Their Success to Justify Reduced Staffing**
- 5. SSA Should Realign the Workforce and Staffing Components of the Office of Disability Adjudication and Review, and**
- 6. The Correct Decision Should Be Made as Early As Possible in the Claim Review Process To Reduce Processing at the Hearing Level**

Now let's take a look at each of these recommendations:

- 1. SSA Should Continue to Hire Administrative Law Judges and Fully Staff Hearing Operations**

The Commissioner has announced plans to hire 175 ALJs this fiscal year, with offers accepted by 135. The first group will be reporting to training soon. Studies have shown that to have an effective hearing operation, it is necessary to have approximately 4.5 staff for each ALJ. The new hiring plan does not apply the 4.5:1 staffing formula to new ALJs or significantly address the continuing shortage of staff in the offices. The current staffing is well below the target and largely negates much of the potential productivity of the ALJs.

While hiring additional ALJs is important, it should be noted that the hiring of approximately 135 ALJs is not an absolute increase in ALJs from prior years. It is only a down payment on the attrition that has taken place and does not come close to matching the phenomenal increase in pending cases. To hire ALJs without appropriate staff, however, is like hiring pilots to solve the problem of an airline not flying on time. The lack of support staff for an airline will still result in delays in boarding passengers, refueling, loading and unloading luggage, and necessary maintenance. It is the same with hiring ALJs without adequate staffing. Without adequate staff the cases will not be entered in a timely fashion into the computer system, the written evidence in cases will not be associated and placed in evidence, hearings will not be promptly scheduled, medical and school records to be utilized as evidence will not be ordered, inquiries from Congress, claimants and their representatives will not receive timely responses, consultative examinations will not be ordered, and decisions will not be timely drafted and mailed.

Experience has shown that the loss of an ALJ in an understaffed hearing office does not usually result in a large percentage of his or her case production being lost. The support staff can only prepare so many cases to be heard and can draft only so many decisions. The other ALJs who were previously underutilized with the existing staff will pick up most, if not all, of the cases the departing ALJ would have produced. My office lost two ALJs to retirement during the last year, yet disposed of more cases than ever before. It is often said that hiring more ALJs without staff is just slicing the pie into more pieces without increasing the size of the pie.

There is another worrisome concern, owing itself to the attrition of valuable support staff. The Commissioner has offered early retirements to ODAR employees and others. In addition, many of the newly hired ALJs were formerly either Hearing Office Directors, who are the highest non-ALJ in the office, or attorneys, who were either group supervisors or senior attorneys. This means that ODAR will be losing many of its best and most seasoned support staff. It is critical that these staff positions and others be filled. If SSA only hires ALJs, total productivity will rise only marginally, as the total number of cases will just be split more ways. Also there will be a loss of productivity as we use ALJs and senior staff to train the new ALJs and staff hired or promoted to new responsibilities.

## **2. SSA Should Continue to Fully Implement the Electronic Disability Process (eDIB)**

SSA is strongly committed to a paperless file – called eDIB -- but it is a work in progress and needs to be fully funded to be successfully implemented. Improvements need to be made to assure the system can support this growing workload or we risk a slowdown or even a crash of the system, which contains several hundred thousand electronic files.

SSA is experimenting with National Hearing Offices in Falls Church and Albuquerque, in which ALJs will hear electronic cases from across the country by video. Since the two National Hearing Offices will only hear cases by video and not conduct in-person hearings, we are concerned that claimants will not have a realistic choice regarding their entitlement to an in-person hearing. Many of our members do not regard video hearings to be sensitive enough to decide close disability cases. It is often difficult to decide issues of pain, mental health, or veracity in person. A mere video image of a claimant may not promote the accurate resolution of such subtleties. For some claimants, appearing before a video camera makes them nervous, confused or otherwise unable to properly present their claims. We believe it may be a Hobson's choice to have a video hearing now, or an in-person hearing a year-and-a-half from now. Video hearings can help reduce the backlog provided the claimant always retains the right to an in-person hearing in the not distant future. We urge the Commissioner to provide real protection for the right to opt out of a video hearing without the punishment of additional significant delays. We caution that the amount of resources dedicated to electronic hearings not cause the Administration to lose sight of the claimant who has been waiting years to be heard on his paper file.

## **3. SSA Needs to Fund Capital Expenditures to Add New Hearing Offices and Permanent Remote Sites**

A hearing office is an office where ALJs and staff are permanently assigned and hear cases. A permanent remote site is a location that SSA controls through ownership or lease where ALJs hold hearings, but no ALJs or staff are assigned. In the absence of

permanent remote space, SSA uses temporary space, such as hotel conference rooms on an as needed basis, to hold hearings. Both the current and the prior Commissioner approved several new hearing offices based on the pressing need for the facilities. However, when the budgets were awarded, it was determined that adequate funding was not available. Two of the offices were Tallahassee and Ft. Myers, Florida. The need for permanent sites is even more important in an eDIB environment where computers are needed for each of the participants. An ideal situation provides for a permanent location so the equipment does not need to be stored, transported and set up for each day of hearings. Tallahassee not only does not have a hearing office, despite being approved by two Commissioners, but does not even have a permanent remote site. The option of video hearings does not exist in temporary remote sites because there is no place to install video communication lines and equipment. We believe additional funding is needed to establish permanent hearing offices at appropriate sites. Utilizing 2006 census data, Florida (with a population of 3.6 million people per office), Georgia (with 2.3 million people per office) and North Carolina (with almost 3 million people per office) have an extremely low number of offices relative to their population. By contrast, the other Region IV states have less than 1.5 million people per office. Undoubtedly, SSA needs additional funding to establish hearing offices and permanent remote sites within reach of the claimants they are mandated to serve.

#### **4. SSA Should Test Initiatives Before Full Implementation and Not Count on Their Success to Justify Reduced Staffing**

Late last year the Government Accountability Office issued a report that found that some of the key reasons for the backlog were the increase in applications, losses of key personnel, and management weaknesses. (*Social Security Disability: Better Planning Management and Evaluation Could Help Address the Backlogs*, December 7, 2007, GAO-08-40) Management weaknesses were compounded by the implementation of new initiatives without sufficient preliminary testing. The Disability Service Improvements initiative (in the New England region) and the Hearing Process Improvement initiative were severely criticized by GAO for lack of adequate testing.

We are similarly concerned that SSA's current implementation of new initiatives -- like e-scheduling and other software improvements -- without sufficient testing in pilot demonstrations will not offer promised productivity that SSA is counting on, and even possibly contribute to a larger backlog. For example, one new initiative -- e-scheduling -- is a centralized and computerized process of scheduling hearing participants: representatives, claimants, vocational experts, medical experts, and contract hearing reporters. Currently, a clerk calls these individuals to schedule and assure their availability. On the other hand, e-scheduling is more primitive in that it does not take into account the many variables that are involved in scheduling hearings. For example, many attorney representatives of claimants practice in multiple hearing offices, and the e-scheduling software does not know their Federal or state court schedule, the amount of time it takes to get from one hearing office to another if they are being scheduled for two offices in a day, how close an ALJ usually is able to keep on schedule, and other factors.

While e-scheduling may work in some locations, it should be thoroughly tested before widespread implementation. More important, it should not be prematurely counted as a success that justifies a staffing reduction until it has been successfully implemented on a widespread basis. We have similar concerns regarding plans for the development of software to select and number medical evidence and eliminate duplicate exhibits. We believe ODAR should hire temporary employees to reduce the backlog until these initiatives are proven worthwhile.

#### **5. SSA Should Realign the Workforce and Staffing Components of the Office of Disability Adjudication and Review**

ODAR's workforce is not sufficiently balanced – in terms of the locations of ALJs and staff – to deal with the rising case backlog. For example, four offices have less than 300 cases pending per ALJ, while 26 offices have over 1,000 cases pending per ALJ. A realignment can be accomplished by a combination of case transfers and the realignment of service areas. Although the Commissioner plans to actually reduce case transfers, this approach had proven largely successful, though used only sporadically. We urge the Commissioner to continue these transfers until there is roughly the same processing time throughout the nation.

Variances in waiting time are due to inadequate staffing, high growth of new cases, and the misaligned boundaries of service areas. While lack of productivity is sometimes used to explain long waits, the data shows that 35 offices receive less than two cases per ALJ per day, but eight offices receive over four cases per day per ALJ. Since average ALJ productivity is less than 2.5 cases per day, the misalignment of ALJs and cases in those eight offices contribute to the backlog. Until these underlying reasons are addressed and successful action taken to correct the problems they create, an aggressive case transfer process is needed. Historically, case transfers have been short term efforts, but they need to be viewed as an integral part of the business process until the inequalities in waiting times are resolved.

#### **6. The Correct Decision Should Be Made as Early As Possible in the Claim Review Process To Reduce Processing at the Hearing Level**

There is great disparity among the various state agencies that make the initial and reconsidered determinations on disability claims. In fiscal year 2006, the national average of initial claims allowed was 35%. Yet, Georgia allowed 25%, Tennessee allowed 23%, Kansas allowed 28%, Ohio allowed 27% and South Carolina allowed 23%, while New Hampshire allowed 59%, District of Columbia allowed 54%, Hawaii allowed 53% and Virginia allowed 44%. Congress has held hearings on this issue and there is still no compelling explanation of the disparity. One of former Commissioner Barnhart's proposals in the Disability Service Improvement initiative was to create a federal quality assurance program involving centralized review of cases from all over the country by the same federal office. This is currently being carried out on a localized or regional basis

when the reviewing entity and respective review standard are known by the state. We believe there should be a quality assurance process that applies a national and uniform policy of review. Such a policy should address the sufficiency or completeness of medical evidence before a decision is made. We support further inquiry to better to determine the reasons for the wide disparity in allowance among the states and at different levels.

If SSA continues the current process of excessively denying eligible claimants initially, the administrative costs will naturally escalate as more cases continue to be appealed and waiting times increase. Obviously, wrongful initial denials cause great hardship to citizens who have paid their Social Security taxes to obtain insured status and do not receive the benefits to which they are entitled.

Eleven years ago, GAO testified to the House Social Security Subcommittee that “Despite SSA attempts to reduce the backlog through its STDP initiatives, the agency did not reach its goal of reducing this backlog to 375,000 by December, 1996.” (*Social Security Administration: Actions to Reduce Backlogs and Achieve More Consistent Decisions Deserve High Priority*, April 24, 1997, GAO/T-HEHS-97-118) The backlog at that time was defined as cases pending for more than 270 days, and the goal was to reduce pending cases to the 375,000-mark. Today, the backlog has exploded to more than 750,000 pending cases. Last year, SSA targeted adjudicating aged cases of 1,000 days at ODAR and this year is targeting 900-day-old cases. GAO has issued other reports addressing the lack of an effective quality assurance program and the failed effort of improving consistency between the initial decisions and hearings at the appeals level. (See, e.g., *Social Security Administration: Disappointing Results from SSA’s Efforts to Improve the Disability Process Warrant Immediate Attention*, February, 27, 2002, GAO-02-322) SSA needs to be sure its national criteria are applied as uniformly as possible at all levels and in all states.

While the experience of the members the FBA’s Social Security Section is associated more directly with ODAR and the Appeals Council, we have noticed a significant decrease in service at the district offices, the teleservice center (800-number), the payment center, and the disability determination services. Essential workload such as continuing disability reviews and age 18 redeterminations to determine whether beneficiaries continue to qualify for benefits appear to be receiving less attention. It has been shown that continuing disability reviews (CDRs) save over \$10 of program funds for every \$1 spent in administrative costs of conducting CDRs. We urge the Congress to appropriate sufficient funds so that the backlog of CDRs and redeterminations can be significantly reduced and bring about service increases in all components.

Mr. Chairman, thank you once again for the opportunity to appear before you today. The Social Security Section of the Federal Bar Association looks forward to working with you and the Social Security Administration in improving the disability process. I would be happy to answer any questions you may have.