



Federal Bar Association

Social security Law section

**STATEMENT OF
THE HONORABLE LARRY A. AUERBACH
ON BEHALF OF THE
SOCIAL SECURITY SECTION
OF THE
FEDERAL BAR ASSOCIATION**

ON

**CLEARING THE DISABILITY CLAIMS BACKLOGS:
THE SOCIAL SECURITY ADMINISTRATION'S PROGRESS AND
NEW CHALLENGES ARISING FROM THE RECESSION**

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

NOVEMBER 19, 2009

Chairman Tanner, Ranking Member Johnson, Members of the Subcommittee:

I am Larry Auerbach and I am appearing here on behalf of the Social Security Section of the Federal Bar Association. I am an Administrative Law Judge (“ALJ”) in the Office of Disability Adjudication and Review of the Social Security Administration in the Atlanta, Downtown hearing office. While having only been an ALJ for three and one-half years, I have heard and decided approximately 1,700 appeals. Prior to becoming an ALJ, I was an attorney for 27 years with the Office of the Solicitor, U.S. Department of Labor; during the last 12 of those years I served in various management positions, including Deputy Regional Solicitor.

I am pleased to be here today representing the Social Security Section of the Federal Bar Association. My remarks are exclusively those of the Social Security Section and do not necessarily represent the views of the Federal Bar Association as a whole. Moreover my remarks do not reflect the views of the Social Security Administration.

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

The common focus of the FBA’s Social Security Section is the effectiveness of the adjudicatory process at all phases including hearings in the Office of Adjudication and Disability Review (ODAR), the appeal process before the Appeals Council, and judicial review through the federal courts. Our highest priority is ensuring the integrity, fairness, independence, and effectiveness of the Social Security disability adjudication process to those it serves -- both Social Security claimants themselves and the American taxpayers who have an interest in ensuring that only those who meet the criteria for eligibility receive these benefits.

We appreciate the continuing commitment that the Social Security Subcommittee has shown for fair and effective adjudication of disability claims. As we will discuss in more detail below, your support has enabled the Social Security Administration to reverse the long-standing trend toward increased backlogs and longer wait times. Most importantly, this is being done without sacrificing due process. We strongly believe that the growing disability claims workload can, and indeed must, be addressed without limiting claimants’ opportunity for full due process at every stage. In fact, we believe that affording due process at every stage is essential to fulfilling the Commissioner’s objective of reaching the right decision at the earliest possible stage of the process. The ODAR hearing before an impartial judge is the method by which claimants have an opportunity to tell their story. This right must never be abridged.

Increased staff and improved technology have had a dramatic and positive effect on the disability appeals process. By way of example, in October 2009 ODAR had 66,200 case dispositions. This is an increase of almost 60 percent from October 2007 when there were 41,361 dispositions. We applaud Congress for the funding which has made this possible. Nevertheless, delays remain at unacceptable levels. Furthermore, increases in applications will strain even the increased resources. A growing adjudicatory backlog is foreseeable unless significant additional resources are provided.

* Our members include Attorney representatives of claimants, Administrative Law Judges, Administrative Appeals Judges, staff attorneys in the Office of Disability Adjudication and Review, attorneys in 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.

When we speak of anticipated increases in case filings due to the difficult economy, it is important to note that this is not based on mere speculation. ODAR hears cases which have been appealed from state Disability Determinations Services and in 2009 alone, there was a 38 percent increase in the number of disability claims received by these state agencies. As we will discuss in more detail, projections call for even greater increases in coming years

We thank the Social Security Subcommittee for holding this hearing and for keeping the attention of the American public on the problems faced by hundreds of thousands of Americans who too often wait years for a determination of their claims. The Social Security Administration's Inspector General has reported that the long waits adversely affect as many as 80 percent of all claimants, with 30 percent saying that the long waits impacted their access to health care.

As a judge, I see the human face of these statistics. Few days pass during which I do not see severely disabled individuals who have suffered serious and even irreparable physical, emotional and economic harm while awaiting a decision. It is sadly common to see medical treatment notes which state, for example, that:

1. A claimant is awaiting approval of disability benefits so he can have necessary back surgery.
2. A claimant could not afford his diabetes medication and has now developed irreversible neuropathy or retinopathy.
3. A claimant's psychiatric condition has deteriorated because of the lack of funds for therapy and medication.

It is also common to see individuals who have lost homes and cars while awaiting a benefits determination. The losses do not just result in the loss of creature comforts for claimants. They result in the loss of safe and secure housing, the loss of transportation to medical care, and even the loss of a stable address where claimants can be contacted regarding their health or the status of their disability claim.

It is important to avoid viewing that disability adjudication process as merely cold numbers and statistics. Each case represents a human being, and often a family, whose lives are on hold awaiting a decision. The time spent in each stage of the claims process - from initial application to final determination - is a seemingly endless wait to those in need. The maxim, "Justice delayed is justice denied," is never more true than in the disability adjudication process.

We commend the Commissioner on the great strides which have been made in reducing the backlog and reducing wait times. The Commissioner is in the fourth year of an ambitious program ensuring that those claimants who have waited the longest have their claims adjudicated. In the first year of this program, the Commissioner directed that all claimants whose hearing requests would have been pending for 1000 or more days received ALJ decisions by the end of fiscal year 2007. Each year, the Commissioner has set his goal as shortening this time, and he has achieved each goal.

The current goal is that by the end of fiscal year 2010, ODAR will have held hearings and issued decisions for every claimant whose request for hearing would be 800 days old by that date. The goal is to ensure that all claimants who requested a hearing on or before July 18, 2008 receive an ALJ-issued decision by September 30, 2010. This goal is achievable, but we must note that upon meeting this goal we will still have claimants who have waited for a decision well over two years since their request for hearing. It is also important to remember

that these claimants all have been through the mandatory state Disability Determination Service (“DDS”) administrative process prior to requesting a hearing, a process that commonly takes six months to one year.

Our testimony today advances five recommendations:

- 1. State Disability Determination Services should be provided significantly enhanced resources.**
- 2. SSA should continue to hire Administrative Law Judges and support staff, and add needed hearing offices.**
- 3. SSA should continue to develop and implement improved technological and other initiatives.**
- 4. New efforts are needed to accomplish the Commissioner’s goal of making the right decision at the earliest possible stage.**
- 5. Continuing Disability Reviews should be fully funded at every stage of the process.**

Let’s examine each of these recommendations:

- 1. State Disability Determination Services should be provided significantly enhanced resources.**

Initial disability determinations are made by state Disability Determination Services. These state agencies are funded by the federal government. Only claimants who are denied fully favorable decisions by these agencies may request hearings before an Administrative Law Judge in ODAR. These DDS decisions have a major impact on the workload of ODAR and play a vital role in the disability process. In these difficult economic times, the number of disability claims is increasing dramatically. In fiscal year 2009 there were 385,000 more claims filed than in the prior fiscal year. This is a one-year increase of approximately 15 percent. Estimates are that in 2010 there will be 733,000 more disability claims filed than in fiscal year 2008. Current estimates by SSA’s Office of Budget indicate that in fiscal years 2009 through 2012 there will be over 2.25 million more disability claims filed than there would have been if the 2008 rate had remained constant. This is a staggering increase in the workload of DDSs.

Aging baby boomers, inadequate healthcare, and decreased jobs in the economy all contribute to the projected increase in the number of claims. The increased numbers of claims do not represent simply unemployed individuals who are capable of competitive work. Many are individuals who, due to mental or physical impairments, were marginally productive workers in years past. In today’s struggling economy, businesses find that they simply cannot afford to retain such workers. Of course, all claimants, whether or not they qualify for benefits, are entitled to a fair and timely adjudication of their claims.

The DDSs are overburdened and improved efficiency cannot prevent the increased numbers of applicants from causing delayed decisions by the DDS. Further, increased pressure on state workers to decide more and more cases is likely to decrease the time spent on each determination and thus negatively impact the accuracy of the decisions made. Such a result would be detrimental to the claimants who may be wrongly denied benefits, as well as to American taxpayers who will bear the costs of improperly granted benefits.

The problem is further exacerbated by the many states who, for economic reasons, have furloughed state employees, including DDS workers. Despite the fact that 100 percent of the salaries and overhead expenses of

DDS employees is borne by the federal government, these states have decreased the number of DDS workdays available to process the increased number of cases. Some governors have continued their “savings” despite the fact that two months ago Vice President Biden sent a letter to Governor Edward Rendell of Pennsylvania, the Chair of the National Governor’s Association, urging that DDS employees be exempt from state furloughs.

This situation requires immediate attention. We urge Congress to respond by not only providing adequate funding for DDS, but also requiring full work weeks for DDS employees.

2. SSA should continue to hire Administrative Law Judges and support staff, and add needed hearing offices.

In the last 18 months, SSA has significantly increased the number of Administrative Law Judges and support staff. These increases are ongoing and many of the newest staff are still working their way to full productivity. This increase in resources already has resulted in a dramatic increase in the number of adjudications. It is important to note that ODAR has not simply added people; it has added a corps of highly competent and dedicated individuals. Each decision made by ODAR judges is important to the taxpayers and is critical to the claimant. Our newest judges have shown themselves to be capable adjudicators who understand how important it is to make the right decision and how to do so with speed and efficiency.

The Commissioner has wisely matched increased numbers of ALJs with significant increases in support staff. It is critical that the numbers of ALJs and support staff continue to increase. As I commented at a recent staff meeting, statistics may indicate that I produced a certain number of dispositions, but that is misleading. I do not decide cases by acting alone. There are staff members who organize the evidence and schedule the hearings, others who obtain missing medical evidence and arrange for necessary consultative examinations, and still others who perform a myriad of tasks essential to the adjudicatory process. In addition, staff attorneys and paralegals turn decisional instructions into draft decisions. Each case disposition is the product of a team of individuals.

Commissioner Astrue has recently increased the support staff to ALJ ratio from just over four support staff members per ALJ to about four and one-half support staff members per ALJ. We believe that this increase will add efficiency to the adjudicatory process. We commend the Commissioner for this staffing decision. As we move to greater reliance on technology, it is hard to predict what the most effective and efficient ratio will be. We urge the Commissioner to continue to monitor the staffing ratios so as to maximize the ALJ’s ability to produce legally sound and just decisions.

As discussed later, electronic processes have substantially increased efficiency. However, there is a critical limit to this. Each decision requires a judge to analyze and fully understand the medical evidence and other documentation in a file. The judge must then use good judgment to apply the law to the facts he finds. Electronics cannot replace human judgment. No matter how efficient our technological processes become, critical judgments must be made thoughtfully by human beings. If for no other reason, this immutable fact requires that there be increased staffing. Otherwise, the increased number of claims will exacerbate the unconscionable delays which have been faced by citizens who have come to their government in their time of need.

The Commissioner has opened two national hearing offices and plans to open two more. These offices conduct video hearings in states where they are most needed. This has helped reduce the backlog and improve the

disposition time. In addition, the Commissioner plans to build 13 traditional hearing offices around the country. If these are properly located and staffed, they should help reduce the backlog of cases.

Efficient and fair adjudication can be advanced through greater use of technology, and SSA is making that happen. But we cannot rely on technology alone. SSA must continue to increase its cadre of well-trained, skilled, motivated, and caring employees - both ALJs and support personnel.

3. SSA should continue to develop and implement improved technological and other initiatives.

SSA is rapidly moving to implement a fully electronic business process. This process has significantly enhanced efficiency. I fully expect that the implementation of newer technology and processes will further enhance efficiency. Electronic files have also helped improve the decisional process by making it easier for the judge to fully review the evidentiary record.

Improved use of technology has also enhanced the efficiency and productivity of ODAR. Funding hardware and software for full implementation of technological advances is undoubtedly expensive. However, we believe that doing so is essential to reduce the hearing backlog. In the long run, technology will save many times its cost and it will greatly assist SSA's ability to provide timely and just decisions.

Video hearings enable judges to conduct hearings without traveling to remote hearing sites. Judges are able to interact with claimants by videoconferencing so that the claimants can be seen and heard as if they were in the hearing room with the judge. This has added to ODAR's flexibility in using resources where they will be most effective in accomplishing our mission and reducing our backlog. As an example, in a single week I have conducted live hearings in Atlanta, Georgia and video hearings with claimants in Greenville, North Carolina and Tampa, Florida. By teleconferencing, I did this without travel expenses and with no work time spent traveling.

Video hearings may not be right for every claimant. Some of the Federal Bar Association Social Security Section's members have expressed concerns that video hearings may make it more difficult for judges to accurately decide issues such as pain or mental health, or may make some claimants unduly nervous or confused. The Commissioner's rules permit claimants who are concerned about video hearings to opt out of such hearings and to have an in-person hearing without undue delay in their cases. This option is an important protection for the claimants' right to due process. If this option were to be eliminated, the credibility of the hearing process would be undermined.

ODAR is rapidly moving to the point where all evidence will be stored electronically and there will be no paper files. The advantages of this are numerous. When working with thousands of paper files, it was too common for staff to have to take valuable time to search for a file that had accidentally been misfiled, was being reviewed by an expert witness, or had simply been mislaid. This wasted time has been eliminated.

In addition, the production of electronic copies of the record for use by claimant's representatives, or medical or vocational experts in advance of the hearing is much easier and faster. In the past, the claimants' representatives had to arrange to review voluminous files in ODAR offices or arrange for them to be copied. Now, in a fraction of the time previously required, an electronic copy can be created for the experts and the claimants' representatives.

ODAR is implementing a technology referred to as the “Representatives Suite of Electronic Services.” This will permit claimants’ representatives to view the complete up-to-date evidentiary file on their own computers. Security safeguards are being built into this system to prevent unauthorized access to the obviously highly sensitive documents in claim files. When this system is fully implemented, it will save resources that are now spent providing claimant representatives computer disks with file information. Currently, this often occurs two or more times in a single case to ensure that the representative has current information during preparation. This technology will also reduce time spent in hearings ensuring that all evidence is in the file.

ODAR has a number of judges and decision writers who work flexi-place on a regular basis. This is consistent with Government policies encouraging flexi-place and tele-work. Currently these employees must have computer disks made for each file. This consumes significant time and creates a huge number of disks that have to be destroyed. We recommend that the Commissioner explore improvements in technology to allow SSA employees to have the same secure access to electronic files that claimants’ representatives will have.

There are other, as yet unexplored, technological tools that will be of great value. These might include the ability to search all of the medical evidence in a file for key words or dates so that a judge can more readily review all medical evidence related to a particular impairment or a particular time period.

Increased use of senior attorneys has been another important tool in enhancing ODAR’s efficiency. We commend the Commissioner for permitting senior attorneys to review files and issue fully favorable decisions when warranted by the evidence. We look forward to the creation of the Virtual Screening Unit, whose establishment is under way. One hundred senior attorneys in this unit will review cases selected by a sophisticated computerized process as potentially appropriate for fully favorable decisions without a hearing. These initiatives involving senior attorneys will enable deserving claimants to get earlier decisions and free up ALJs to hear and decide more difficult cases.

4. New efforts are needed to accomplish the Commissioner’s goal of making the right decision at the earliest possible stage.

The DDSs make the initial determinations regarding disability claims and therefore have the first opportunity to make the correct decision. While these agencies operate with federal funds under a uniform set of federal rules and regulations, the outcomes are far from uniform. Even a cursory glance at approval rates by various DDSs shows that there are significant disparities among the states. In fiscal year 2008, Georgia and Tennessee DDSs approved benefits on initial determination in only 25 percent of the claims filed. In contrast, in 2008 Virginia DDS awarded benefits to 44 percent of its claimants on initial application, while New Hampshire DDS granted benefits to 52 percent its claimants at that stage. These disparities cannot reasonably be explained by state or regional population differences. In 2008, Mississippi DDS approved 24.5 percent of claims at the initial stage while in the neighboring state of Arkansas, the rate was 36 percent (almost a 50 percent higher.) Similarly Connecticut DDS’s rate was 33 percent approval compared to its neighboring states of New York (44 percent), Massachusetts (46 percent), and Rhode Island (38 percent).

My own personal experience is based upon a relatively small sampling of primarily Georgia disability claims. I do not see claims in which benefits are awarded by the state DDS, but I have had the opportunity to review a large number of claims that have been denied by the Georgia DDS. Other members of the Federal Bar Association have shared their experiences with me as well. Based upon this experience, it appears that all too often, the DDS has paid scant attention to the effect of pain and fatigue on a claimant’s ability to work. This occurs despite Social Security Rulings that mandate consideration of these factors.

The disparities among states should be addressed for a number of reasons. The first and foremost is basic justice. The outcome of a claimant's case should not depend on his or her state of residence. In addition, improper early stage denials cause undue hardship to claimants and increase the workload, and thus the backlog, of hearing offices. If higher approval rates are the result of improper approvals, this places an unnecessary burden on American taxpayers.

SSA has a quality review process that is designed to ensure that state DDSs follow federal rules. This process should be enhanced to ensure accurate and fair determinations. Where SSA review shows a significant error rate, the Commissioner should take, or be required to take, action. This should include the delivery of enhanced training to DDS staff and management and closer oversight of the state's work until significant progress is made. For the benefit of the claimant and the taxpayer, SSA needs to receive and be a good steward of the resources and authority provided by Congress, and Congress needs to continue to exercise the necessary oversight.

5. Continuing Disability Reviews should be fully funded at every stage of the process.

SSA conducts Continuing Disability Reviews (CDRs) to assure that recipients of disability benefits continue to satisfy eligibility requirements. CDRs serve two important purposes. First, they save taxpayer money. As Commissioner Astrue noted in his March 24, 2009 testimony before this subcommittee, every dollar spent on CDRs yields ten dollars in program savings. Second, CDRs provide recipients an incentive to fully utilize available medical care, vocational rehabilitation services, and job training to help them re-enter the workforce.

Because of inadequate funding levels for over a decade, SSA has accumulated a significant backlog of nearly 1.6 million full medical Continuing Disability Reviews. The failure to timely conduct these reviews has significantly affected the federal budget and the deficit. It has been estimated that, if these CDRs had been conducted on a timely basis, over \$20 billion in long-term Social Security program savings would have been achieved. Unfortunately, current estimates project that SSA will only be able to conduct 329,000 full CDRs in FY 2010.

Funding of CDRs will not reduce the hearing backlog and, in fact, it may add to it. When benefit recipients are found to no longer be eligible for benefits, some will seek hearings challenging these determinations. These hearings are an important due process right that should not be abridged. Full funding for CDRs must include additional funding for ODAR to adjudicate CDR appeals. This will require funding above that needed to eliminate the backlog of initial claims. When considering this additional funding, it is important to keep in mind the savings created by CDRs. Conducting continuing disability reviews is the right thing to do for the taxpayers and for the recipients of benefits.

Mr. Chairman, thank you once again for the opportunity to appear before you and the subcommittee 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 adjudication process. I would be happy to answer any questions you may have.