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Improving the Social Security Administration's Hearing Process

September 2006

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Executive Summary

In examining the hearing process, our goal is a process that embodies the public's interests of fairness, consistency, and efficiency. Our major concerns with the current process are lack of consistency, processing times and backlogs, productivity, hearing office management, and the SSA-ALJ relationship.

- Our concern with consistency is based on variations in allowance rates. The extent of variance, supported by data from quality assurance reports, suggests that ALJs may be applying law and agency policy differently. SSA should ensure that its policies are being applied consistently.
- Processing times and pending caseloads have been rising to levels that impose an intolerable burden on claimants.
- The extent of variation in productivity indicates a need to explore the reasons for it and to take steps to increase productivity at the lower end of the spread and to ensure that the upper end is appropriately balanced with decisional quality.
- The current condition of hearing office management does not provide needed incentives and supports.
- The relationship between SSA and its ALJs seems to have improved since our last report on the hearing process but still needs attention.

SSA has begun implementing a set of changes to its disability process that are known collectively as Disability Service Improvement (DSI). We are generally supportive of the agency's new approach. There are, however, some keys to successful implementation of DSI. The agency must seek and the Congress must provide adequate resources to meet the needs of both the evolving and existing systems, or the new system will not provide the results that are expected of it. Beyond financial resources, however, the success or failure of the new adjudication structure will depend on how well the implementation is managed. It is essential that good workload data and other management information be collected as the new processes are rolled out and that the information be used internally and made available publicly so that the new procedures can be carefully evaluated on an ongoing basis. In implementing the new regulations, the agency must encourage prompt, frank, and open communication among all levels of the agency of problems that are encountered. We also have some more specific recommendations for aspects of DSI.

SSA is using technology to improve the hearing process. Its new electronic disability system should make hearing offices more productive and reduce processing times. SSA has made great strides in the use of video teleconferencing in the last few years; we encourage it to go even further. We are encouraged by the implementation to date of new decision-writing software.

We also have several recommendations for further action:

- The selection process for ALJs should be reformed to make it more responsive to the needs of SSA.
- The ALJ pay system should be revised to provide additional incentives to recruit and retain hearing office chief ALJs (HOCALJs). SSA should also explore with the Office of Personnel Management the possible use of pay for performance for ALJs, with due care for the need to protect decisional independence.

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- SSA should address the de facto dual management structure for the hearing office process, which results in confusion and lack of accountability and should provide HOCALJs with the tools and supports they need to do their job well.
- SSA's multilevel appraisal system should be expanded to all parts of the hearing process. Appraisals should be based on quantifiable performance data, including both quality and quantity of work performed.
- There is a need for additional training and ongoing professional development.

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I. Background

The administrative structure for determining disability involves different levels of government and different processes, depending upon the stage of an individual's claim. Although SSA is responsible for the program, the law requires that initial determinations of disability be made by agencies administered by the 50 states, the District of Columbia, and Puerto Rico. The state agencies are required to follow the policy guidance of the Social Security Administration and are fully funded by the Federal government.

By regulation, an individual whose claim is denied by the state agency may ask the agency to reconsider the decision and may present new evidence. After the reconsideration decision (or, after the initial decision, in those states where there is no reconsideration step),[1] the statute gives individuals who are dissatisfied with the agency decision the right to request a hearing. Hearings are conducted by SSA's corps of administrative law judges.[2] New evidence is frequently introduced at this stage, and since an ALJ hearing is a de novo proceeding, it is essentially a complete re-adjudication of the case. Although ALJs must follow the agency's regulations and rulings, they exercise decisional independence to ensure a fair hearing. This report will focus on the hearing level.

Individuals whose claims are denied at the ALJ level may appeal their cases to the Appeals Council, which is the final step in the administrative appeals process.[3] At this stage, claimants may continue to introduce new evidence and raise new issues. In addition, the Appeals Council may select cases to review within 60 days of the date of the ALJ's decision; all of these case reviews conducted by the Appeals Council are done on a pre-effectuation basis.

Individuals who disagree with the final administrative decision may pursue their appeals through the Federal District Court, the Circuit Court of Appeals, and the Supreme Court.

Most claims are resolved at the state agency level. Of all the disability claims filed in 2000 (the most recent year for which almost all claims filed have been resolved), 40 percent were allowed at the initial state agency level, another 4 percent were allowed at the reconsideration level, and 38 percent were denied by the state agency but did not pursue their claim to the hearing level. The remaining 18 percent did pursue their claim to the hearing level or beyond, of which two thirds were eventually allowed and one third denied.

Although most cases are decided at lower levels of the disability process, the hearing level is important to examine for a number of reasons. While the number of hearing decisions is small by comparison to the state agency level, it is large in absolute terms. In fiscal year 2005, SSA received nearly 600,000 requests for hearings in Social Security cases. It is also an expensive process, consuming a considerable part of the agency's administrative resources. The agency's administrative cost per case at the hearing level in 2005 was $2,297, including

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[1] The reconsideration step was eliminated in 10 states in October 1999 under a set of changes by SSA aimed at improving the disability determination process. SSA also began introducing a set of changes in August 2006 that will eventually eliminate reconsideration in all states. Those changes are detailed later in this report.

[2] The hearing function was previously in SSA's Office of Hearings and Appeals (OHA). In April 2006, SSA established an Office of Disability Adjudication and Review (ODAR), which now manages the hearing process, the Appeals Council, and some newly established functions.

[3] The changes that SSA began to introduce in August 2006 will also eventually replace the Appeals Council. Those changes are detailed later in this report.

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dismissals and remands. Given the size of the hearing workload, the total administrative costs are over $1 billion per year.

Although most cases do not go to the hearing level, about 20 percent of all allowances are made at that level. The hearing is an important check on the quality of earlier stages of the process, offering a de novo review and an opportunity for a claimant to meet face-to-face with the decision maker in his case.

We have a number of concerns about the hearing process that we will address in this report. SSA is undertaking some initiatives that have the potential to significantly improve the process; we will make some recommendations on implementation of those initiatives. We will also make some recommendations to improve the process in other ways.

In examining the hearing process, our goal is a process that embodies the public's interests of fairness, consistency, and efficiency.

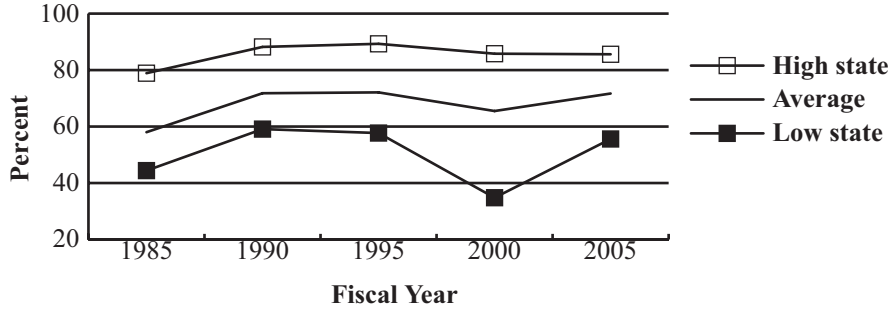
- In order for the public to have confidence in the disability program it must be demonstrably fair. Decisions must be free from bias and from any pressures that might seek to influence the decision.
- The public also has an interest in a consistent system. Claimants and potential claimants want a system that produces the same results for people in the same circumstances. The outcome of a claim should not depend on where the decision is made or who makes it.
- Both claimants and taxpayers want a system that is efficient, that produces results quickly and with only the necessary minimum of expense.

II. Our Concerns about Performance at the Hearing Level

Consistency

One of our concerns is the consistency of hearing decisions. One aspect of inconsistency is that the decisions in this national program seem to vary depending on where they are made. There has been considerable variance in the allowance rates between decisions made in hearing offices in the states with the lowest allowance rates and those in the states with the highest rates, as shown in Chart 1.

Chart 1 Percentage of Favorable Hearing Decisions 1985 - 2005



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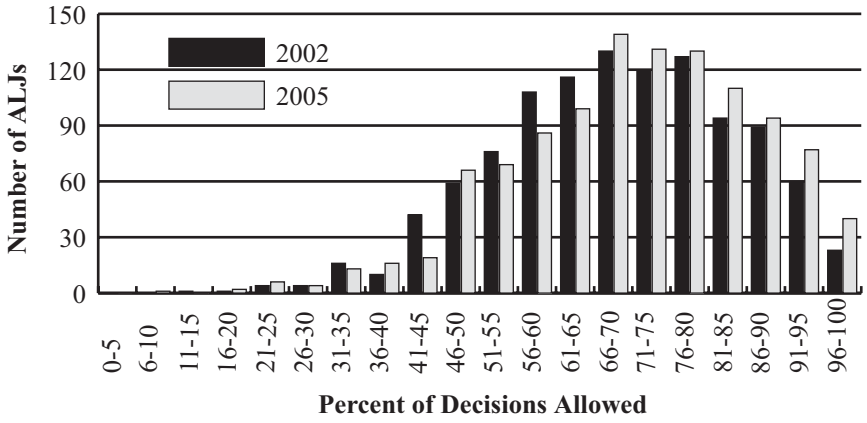
The first potential explanation that comes to mind for this variation is that hearing allowance rates may tend to correct high or low allowance rates at the initial level. A comparison of initial and hearing level allowance rates by state, however, shows that this is not the case. In fact, there is no overall correlation between initial level and hearing level allowance rates.[4]

Another aspect of inconsistency is variations among ALJs shown in Chart 2. The Board recently obtained data showing the distribution of allowance rates by ALJs in SSA cases in fiscal year 2002 and fiscal year 2005. Because ALJs who made few decisions in that year (for example, those who worked only part of the year), might easily have either very high or very low allowance rates with little effect on the overall allowance rate, we excluded from our calculations ALJs who made 100 or fewer decisions in those years.

Chart 2 Frequency Distribution of ALJ Allowance Rates SSA Decisions, FY 2002 - 2005



The chart shows how many of the 1,080 ALJs who made 100 or more decisions in 2002 and the 1,102 ALJs who made 100 or more decisions in 2005 had allowance rates within a particular range.[5] For example, in 2002 116 ALJs had allowance rates between 61 and 65 percent, and in 2005 99 had allowance rates between 61 and 65 percent. The allowance rates are percentages of decisions and exclude dismissals. The following statements apply to ALJs who made 100 or more decisions:

- In 2002, allowance rates of the middle 50 percent of ALJs (those between the 25th and 75th percentile) was between 58 percent and 80 percent.
- In 2005, allowance rates of the middle 50 percent of ALJs was between 60 percent and 82 percent.
- In 2002, the 10 percent of ALJs with the lowest allowance rates had rates of 48 percent or lower.

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[4] For more information on this, see the Board's *Disability Decision Making: Data and Materials*, May 2006 (http://ssab.gov/documents/chartbook.pdf), Chart 54.

[5] In 2002, of the 388,814 cases decided by judges with more than 100 decisions, 70% were allowed. The average allowance rate among the 1080 judges was 68.4% (standard deviation: 15.5%). The median judge allowed 69.4%. In 2005, of the 442,054 cases decided by judges with more than 100 decisions, 72% were allowed. The average allowance rate among the 1102 judges was 70.2% (standard deviation: 15.7%). The median judge allowed 71.2%.

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- In 2005, the 10 percent of ALJs with the lowest allowance rates had rates of 49 percent or lower.
- In 2002 the 10 percent of ALJs with the highest allowance rates had rates of 89 percent or higher.
- In 2005, the 10 percent of ALJs with the highest allowance rates had rates of 90 percent or higher.
- In 2002, the allowance rate of the median judge was 69 percent.
- In 2005, the allowance rate of the median judge was 71 percent.

One potential explanation for those ALJs with allowance rates at the upper end of the distribution is that ALJs involved in initiatives to identify cases that can be allowed without a hearing may be expected to have very high allowance rates.

These data lead us to two concerns. The first is that the degree of variance in this distribution is troubling. It is true that each case has its own individual circumstances and characteristics, and each claimant is entitled to be served as an individual. It is also true that in disability cases, which account for the great majority of hearing cases, ALJs must make an all-or-nothing decision on a great number of cases that fall into a gray area along the continuum of disability. But in a system that essentially assigns cases to judges randomly, individual factors should average out over a period of time.

Our second concern is based on the somewhat higher allowance rates in 2005, combined with the production figures shown in Chart 6 of this report. There is a small positive correlation between the allowance rates and the number of decisions for the years shown. That is, the allowance rates tend to increase as the number of decisions increases. There may be valid reasons for the increased allowance rate. For example if DDSs allow too few cases, that would both increase the hearing workload and require more hearing allowances. But it might also be the case that pressures for increased production lead to an increased number of allowances, which take less time than denials. The agency should analyze this question carefully.

The extent of variance suggests that ALJs may be applying law and agency policy differently. Other evidence supports this suggestion. For example, a peer review of ALJ findings published in December 2005[6] noted continued inconsistent compliance with a set of Social Security Rulings (SSRs) issued in 1996. The report states that ALJs need to fairly and correctly apply the law, regulations, and SSRs. "Failure to do so constitutes an error of law. An error of law is generally indicative that a decision is not legally sufficient."

Another example from the same report concerns the need to inform claimants without representatives about their right to representation. About 17 percent of claimants who receive a hearing decision are unrepresented. In the opening statement of the hearing, the ALJ is to ensure that an unrepresented claimant is capable of making an informed choice about representation. The December 2005 peer report found that ALJs adequately informed unrepresented claimants at hearing of their right to representation 77 percent of the time, down from 81 percent in the

[6] SSA, Office of Quality Assurance and Performance Assessment, *Findings of the Disability Hearings Quality Review Process ALJ Peer Report VI*. The report is based on a peer review of ALJ decisions issued from October 2002 through September 2004.

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previous report.[7] After that previous report was issued in December 2003, the Chief ALJ issued a reminder of the rights of unrepresented claimants, accompanied by a PowerPoint presentation for viewing by individual ALJs as a desk aid. The Chief ALJ's office also issued a large laminated orange desk aid with instructions for addressing the rights of unrepresented claimants. This guide was sent to all hearing offices to be placed on the dais of every hearing room. OHA staff also conducted regional teleconferences that addressed the rights of unrepresented claimants at hearing. The fact that after all this effort, the percentage of unrepresented claimants who were not adequately informed of their rights has risen suggests deliberate lack of compliance with agency policy.

Another example comes from a quality assurance report on dismissals.[8] In the past 10 years, 1 of every 7 to 8 hearing requests in SSA programs have been dismissed, most often because the claimant fails to appear or the request is untimely filed. In doing peer reviews of samples of dismissed hearing requests, ALJs have found problems with the quality of dismissals in repeated reviews. In the most recent study, reviewing judges agreed with only 71 percent of dismissals. More troubling is the type of cases that were dismissed. The reviewers disagreed with dismissals significantly more often in SSI-only cases, claims in which the applicant needed additional assistance due to a mental impairment, and cases in which the claimant was unrepresented. As the report notes, "It appears that the claimants most in need of assistance in the processing of their claims are the most susceptible to dismissal actions."

These examples suggest that some ALJs are simply not following some policies. If policies are being misinterpreted, they should be clarified. If they are being sidestepped, they should be examined to determine if they are unreasonable or need modification. If they are clear and reasonable, they should be enforced consistently.

ALJs are employees of SSA making decisions for the agency in a national program in which claimants and the public expect like cases to be treated alike. SSA should identify the sources of variance and work to reduce them. We believe that some aspects of the new Disability Service Improvement (DSI) initiative, which we will discuss later, will help to do this.There is obviously a tension between the need for consistency and the independence of decision makers. Some would argue that in the interest of protecting the independence of decision makers, the agency cannot conduct the kind of oversight that would be necessary to ensure consistency. We would argue that consistency and independence are not incompatible. The agency has the responsibility – and must find a way – to ensure both independence in factual decision making and correct (and therefore consistent) application of policy.

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[7] The previous report was SSA, Office of Quality Assurance and Performance Assessment, *Findings of the Disability Hearings Quality Review Process: ALJ Peer Report V*, December 2003. That report was based on a peer review of ALJ decisions issued from October 2000 through September 2002.

[8] SSA, Office of Quality Assurance and Performance Assessment, *Dismissal Report*, July 2004.

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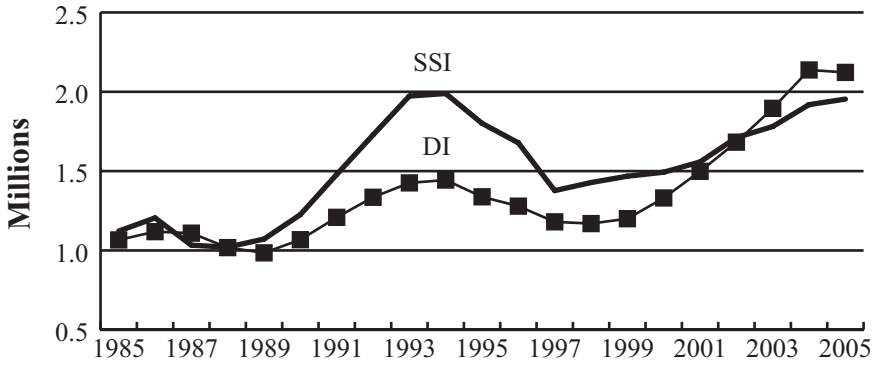
Processing times and backlogs

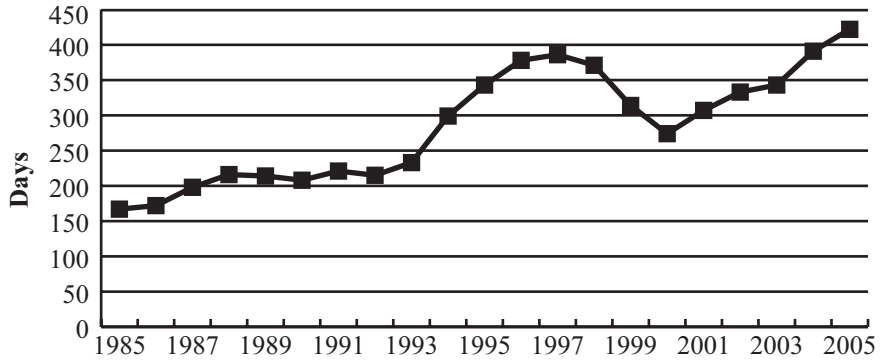
Processing times and backlogs at the hearing level largely reflect the flow of disability applications into SSA as shown in Chart 3. There was a large influx of disability claims in the early 1990s, which subsided later in that decade until claims again began to grow rapidly.

Chart 3 DI and SSI Disability Applications, 1985 - 2005



Since 2000 the average processing time for SSA cases, almost all of which are disability claims, at the hearing level has risen to the highest level ever.

Chart 4 Average Hearing Processing Time, 1985 - 2005



In 1976, Congress enacted legislation to facilitate an expansion in the number of ALJs. It characterized that legislation as being of an "emergency" nature to address the "tremendous" backlog of approximately 105,000 cases, with the objective of eliminating that backlog and reducing the average processing time for hearings to 90 days. In 1991 SSA was concerned about a 229-day processing time and formed a Strategic Priority Workgroup to deal with the problem. Average hearing office time for SSA cases soared in the mid 1990s, as the wave of initial claims filed in the early 1990s made their way through the system. In 1995 when processing time hit 350 days, SSA launched a Short Term Disability Project. After falling to 274 days in 2000, processing times rose to 415 days in 2005. It should be noted that this average includes

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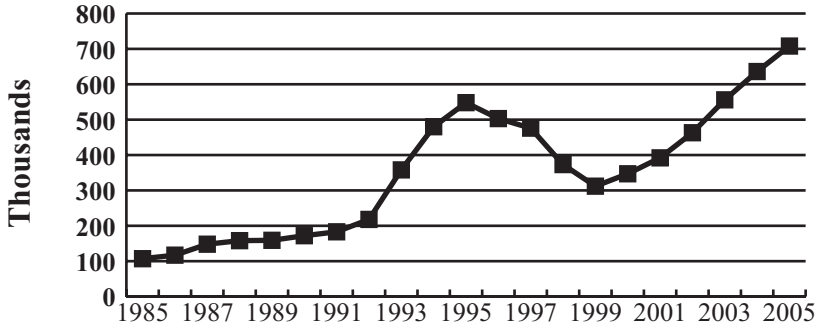
dismissals and decisions made on the record without a hearing. The average processing time for a claimant who has a hearing and waits for a decision is closer to 500 days.

Waiting times of this length impose an intolerable burden on claimants and are simply unacceptable. We must not lose sight of the fact that the hearing process is not about cases or folders but about people, many of whom deserve and desperately need the benefits for which they are waiting. It would be bad enough if only a small percentage of claimants were allowed, but that is not the case. In 2005, 72 percent of decisions in SSA hearing cases were in favor of the claimant.[9] And it would be bad enough if claimants had adequate income while waiting for their decision. But for many, this is not likely the case. We do not have good data on incomes of claimants awaiting a hearing. But we do have data on incomes of beneficiaries. A survey in 2001 found that for 28 percent of DI worker beneficiaries, their Social Security benefits were their only income, and for 47 percent of SSI beneficiaries, their SSI benefits were their only income.

The size of the pending workload in hearing offices – the hole that SSA has to dig itself out of – has followed a pattern similar to that of processing times.

Chart 5 **Cases Pending in Hearing Offices at End of Fiscal Year, 1985 - 2005**



[9] There were 519,359 hearing dispositions in 2005, 71,356 of which were dismissals. Of the 448,003 decisions (dispositions minus dismissals), 322,283 were favorable to the claimant. As a percentage of decisions (excluding dismissals), favorable decisions were 72 percent. As a percentage of all dispositions, favorable decisions were 62 percent.

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At the end of 1985 there were 107 thousand hearing requests awaiting disposition at the hearings level. That number rose gradually through the early 1990s, then more sharply as the wave of initial claims filed in the early 1990s made its way to the hearing level. Pendings peaked at 548 thousand in 1995, then declined gradually. The decline in pendings was associated with an increase in ALJ staffing shown in Table 1. Pendings have climbed steadily since 2000, reaching 711 thousand at the end of 2005.

Table 1

Fiscal Year	ALJs on Duty	Hearings Pending
1986	703	117,384
1987	666	148,398
1988	652	158,892
1989	694	159,268
1990	696	172,756
1991	779	183,471
1992	838	218,423
1993	814	357,564
1994	879	480,102
1995	1014	547,690
1996	1024	503,481
1997	1061	483,712
1998	1153	384,313
1999	1090	311,958
2000	1024	346,756
2001	974	435,904
2002	1082	500,757
2003	1035	591,562
2004	1034	664,276
2005	1096	711,284

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SSA projects the number of disability claims received at DDSs for a 10-year period. Those projections are shown in the second column of the table that follows. A proportionate change in the number of hearing requests would result in the number of hearing requests shown in the third column of the table. The table shows the actual figures for 2005 and projections for 2006 through 2016.[10]

Table 2

Year	Initial claims	Hearing requests
2005	2,551,800	592,343
2006	2,527,500	586,702
2007	2,553,800	592,807
2008	2,535,300	588,513
2009	2,530,000	587,283
2010	2,530,200	587,329
2011	2,537,800	589,093
2012	2,559,500	594,130
2013	2,583,400	599,678
2014	2,608,100	605,412
2015	2,633,600	611,331
2016	2,650,600	615,277

SSA is projecting only a slight growth in the number of initial claims over this period. Assuming that hearing requests rise in proportion, they will grow by less than 4 percent by 2016. The numbers of hearing requests in each year, however, exceed SSA's goal of processing 560,000 hearings in 2006 and in 577,000 in 2007. If SSA achieves its 2007 goal and continues to process that number of hearings every year through 2016, the size of the backlog will continue to grow, reaching nearly 900,000 by the end of the 10-year period.

This growth in backlogs and in the waiting times that would accompany it is not inevitable. There are 3 ways to avoid it. One is to increase the resources expended on the hearing process. The Commissioner of Social Security prepares a 5-year service delivery budget that is updated every year and includes the resources needed to essentially eliminate backlogs over the period. The budget that the President submits to Congress has been smaller than the service delivery budget, and the amount appropriated by Congress smaller still. As the Commissioner recently testified, "[I]n the last several years Congress gave us $720 million less than the President requested, which equates to about 9,000 work years. If we had gotten those 9,000 work years, we would have no backlogs in the hearing offices. There would be 400,000 pending hearings. That amount pending is considered pipeline work just so that there is work going on in the process."[11]

The second way to reduce backlogs is to reduce the flow into the hearing process. SSA's Disability Service Improvement (DSI) initiative includes a new position known as the Federal Reviewing Official that we will discuss later in this report. If properly implemented, this

[10] The figures for initial claims are actual figures for 2005 and SSA workload projections for 2006 through 2016. The figures for hearing requests for 2006 through 2016 are calculated by applying the rate of increase in initial claims to the actual number of hearing requests in 2005.

[11] "Social Security Service Delivery Challenges," Hearing before the Subcommittee on Social Security of the Committee on Ways and Means, U.S. House of Representatives, May 11, 2006.

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position will not eliminate the backlog, but it has the potential to reduce the flow of cases. That implementation, however, will itself require a commitment of resources.

The third way to reduce backlogs is to increase production levels. SSA's new electronic disability system has the potential to increase production to some extent, but it is not a solution to the problem of backlogs. The main savings from the new system at the hearing level will come in the form of reduction of time spent on data entry and file arrangement and preparation. In those offices where these functions are causing bottlenecks, the new system will reduce backlogs and processing time. In other offices, the new system will simply move cases more quickly into another queue, where they will wait for available resources.

Productivity

Our concern about backlogs and long processing times should not be taken as a criticism of ALJs generally or their support staffs. As we have visited hearing offices and spoken with many ALJs or their staffs over the past several years, we have been impressed overall by their hard work and dedication. Still, as in any group of workers, there are some that are more productive than others, and productivity can also be affected by factors such as management environment.

Chart 6 Frequency Distribution of ALJ Decisions, SSA Cases, FY 2002 - 2005

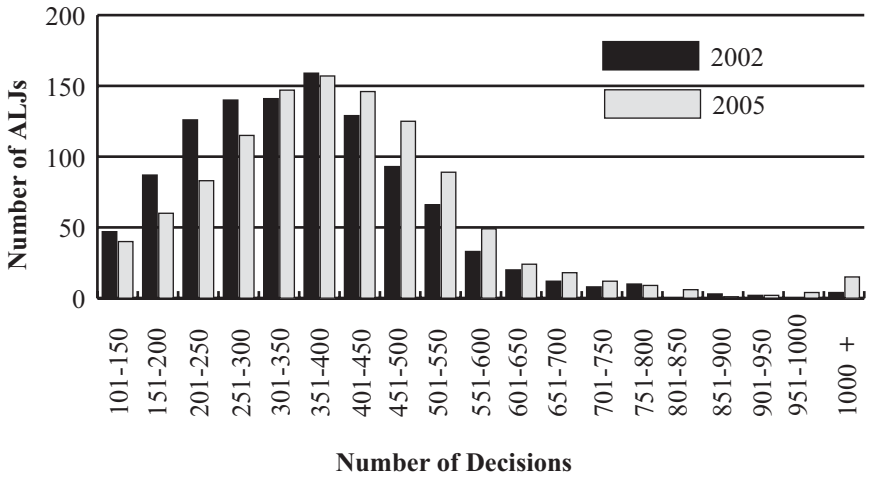

Chart 6 above shows how many ALJs issued a number of decisions falling within certain ranges.[12] The population of ALJs in this chart is the same as that in Chart 2, on the distribution of allowance rates, namely, the 1,080 ALJs who made more that 100 decisions in 2002 and the 1,102 ALJs who made more than 100 decisions in 2005. This chart shows, for example, that in 2002 159 ALJs issued between 351 and 400 decisions, and in 2005, 146 issued between 401 and 450. The chart shows only the number of decisions and excludes dismissals.

[12] In 2002, the 1080 judges with more than 100 decisions decided a total of 388,814 SSA cases. In 2005, the 1102 judges with more than 100 decisions decided a total of 442,054 SSA cases. In 2002, there was an average of 360 cases decided per judge (standard deviation: 147.5). The median judge decided 350 cases. In 2005, there was an average of 401 cases decided per judge (standard deviation 180.4). The median judge decided 383 cases.

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The data show that for those ALJs in those years:

- In 2002, the middle 50 percent of ALJs (those between the 25th and 75th percentile) issued between 254 and 444 decisions.
- In 2005, the middle 50 percent of ALJs issued between 291 and 478 decisions.
- In 2002, the 10 percent of ALJs with the lowest number of decisions issued fewer than 185.
- In 2005, the 10 percent of ALJs with the lowest number of decisions issued fewer than 206
- In 2002, the 10 percent of ALJs with the highest number of decisions issued 537 or more.
- In 2005, the 10 percent of ALJs with the highest number of decisions issued 579 or more.
- In 2002 the median judge produced 350 decisions.
- In 2005 the median judge produced 383 decisions.

There are several possible reasons for low numbers of decisions by some judges. Some judges spent much of their time on Medicare cases, which are not included in the chart, and the SSA cases shown on this chart reflect only a small percentage of their work. Some judges produced few cases due to the time they spent on management or union duties or on details or other assignments. Some ALJs may not have worked a full year, either because they were new or were on leave for extended period because of illness or other reasons or because they left the agency during the year.

There are also possible reasons for high numbers of decisions. For example, some ALJs have been involved in initiatives to identify cases that can be allowed without a hearing.

We find two things striking about these data. The first is that there are fewer ALJs with low production numbers and more with high production numbers in 2005, compared with 2002. We congratulate SSA on this increase in production. As mentioned in the discussion of Chart 2, however, there is a small positive correlation between production levels and allowance rates. This suggests that increased pressures for production may have led to increased allowance rates. If this is the case, it would increase long-term program costs. The agency should monitor this issue carefully.

The second thing that strikes us about these data is that, even given the possible reasons for high and low numbers, the extent of the variation in production seems to indicate a need to explore the reasons for it and to take steps to reduce the lower end of the spread and to ensure that the upper end is appropriately balanced with decisional quality. SSA should find ways to identify and share best practices.

While we appreciate the strides that SSA has made in increasing production, we also recognize that there is a limit to what can be produced with current resources. If the bottom 25 percent of the ALJs shown in Chart 6 had produced in 2005 at the same rate as the median ALJ, which would be a tremendous accomplishment, the total number of cases produced would have increased by 46,000, a 10.4 percent increase. But dispositions still would not have exceeded receipts. It is not reasonable to expect to reduce backlogs without adding resources, reducing the influx of hearings, or using technology to increase productivity.

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In discussing these figures on ALJ decisions, we do not mean to imply that only ALJs have an impact on the number of decisions. ALJs are only a part, albeit a very important part, of the hearing process. They are dependent on others to prepare cases for hearing and to write decisions after the hearings. They need staff in those positions in sufficient quantity and quality.

In fact, many ALJs and management officials have told us that their most urgent need is support staff rather than additional ALJs. We have heard that the type of support staff needed varies from office to office. In some offices there is a shortage of case technicians to prepare cases for hearing. In others, a lack of decision writers creates a bottleneck. In 2005, the median office had between 4 and 4.5 staff members (decision writers, case technicians, and other support staff, excluding those designated as management). This is fewer than the peak in 2001 of 5.4 staff members per judge. Our analysis of the data from 2002 through 2005 shows that, as staff-to-judge ratios increase, dispositions per judge also tend to increase and average processing time tends to decline.

Hearing office management

A key figure in improving performance in SSA's hearing offices is the Hearing Office Chief Administrative Law Judge (HOCALJ). We have met with many HOCALJs who are highly motivated and dedicated individuals. However, the existing structure provides few incentives to accept this difficult position. There is little incentive for them to actively work to improve office performance and few tools and supports for those who try to do so.

The HOCALJ is still an ALJ, responsible for holding hearings and making and issuing decisions. In addition, according to the position description, the HOCALJ has responsibility for the overall management and effectiveness of the hearing office, administrative and managerial responsibility for all support staff in the hearing office, and is to provide leadership and administrative direction to the ALJs as may be required in the course of general office management. The position description lists 2 pages of duties and responsibilities. Among his or her more specific duties, the HOCALJ is to: provide leadership and guidance to all hearing office employees, including ALJs, for the purpose of improving the hearing process and achieving the goals and objectives of the agency; provide advice and guidance to ALJs in substantive program policy and procedural matters relating to the adjudication of cases under the Social Security Act; supervise directly the ALJs, the supervisory staff attorney, and the hearing office director; and provide technical and procedural guidance for the expeditious processing of pending cases.

The HOCALJ's material compensation for taking on these additional duties is, generally, nothing. HOCALJs are at the same pay grade as other ALJs. There may be 2 small rewards for becoming a HOCALJ. If they are not already at the top step of their pay grade, as many are,[13] they receive a 1-step pay increase. And some HOCALJs take the position in order to move to a more desirable office.

What HOCALJs do get, in plentiful measure, are the headaches that come with responsibility without authority. We have been told that, although the ALJ has managerial responsibility for all support staff, in practice there are 2 parallel structures in hearing offices, with the HOCALJ and ALJs in one, and all other staff in the other. We have heard that directives

[13] Further information on the ALJ pay scale can be found on page 23.

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from higher levels are sometimes sent to the hearing office director without the HOCALJ even knowing about them. The HOCALJ is responsible for the performance of his or her hearing office, but HOCALJs are unable to hold ALJs accountable for their performance. A HOCALJ told us, "HOCALJs do not have authority to deal with ALJs who do not carry their load. Some ALJs feel that they can only prepare 20 to 25 decisions a month. And some ALJs write only 5 to 10 decisions a month. The HOCALJs do not have the authority to make ALJs write more decisions." HOCALJs have told us that it is too time consuming to document performance problems in their offices, and, since action is rarely taken further up the line, those who have done so become discouraged.

SSA-ALJ relationship

In our 2001 report on the disability process, we noted a need to change SSA's relationship with its ALJs from one of confrontation to cooperation. There is still a need to improve that relationship. There is a residue of mistrust that goes back at least as far as the late 1970s, when pressures to reduce the number of allowances and increase the number of decisions led to a situation that was described as "an agency at war with itself."[14] Since then, many ALJs have resented what they saw as the agency's failure to consult them about changes that have been made. Lack of consultation on the Hearing Process Improvement initiative implemented in 2000 was a major factor lending support to the formation of the ALJ union. We believe that the SSA-ALJ relationship has improved more recently but still needs attention.

The agency has much to gain from the advice and input of the dedicated professionals in the ALJ corps, at the national, regional, and hearing office levels. The ALJ corps, in turn, needs to acknowledge the agency's legitimate desire to ensure that hearing decisions are made promptly and consistently. There is an understandable and probably inevitable tension between the public's interest in decisional independence and the public's interest in consistency and efficiency, but we believe these interests can be reconciled. We urge SSA and its ALJs to work together to develop reasonable procedures to reconcile them.

III. Changes Under Way

A. Disability Service Improvement

SSA has begun implementing a set of changes to its disability process that are known collectively as Disability Service Improvement (DSI). DSI is being implemented first in SSA's Boston region, which will, in effect, serve as a large-scale pilot of the new process. It will eventually be rolled out nationally. Parts of DSI affect the hearings process and have great potential to improve the process. We will comment on those changes and on what is needed in order for them to be successful.

Federal Reviewing Official

Under current regulations, as they apply in most states, individuals who are denied benefits on the basis of the initial decision by a state Disability Determination Service (DDS) may ask for a reconsideration of that decision. That reconsideration is carried out by different

[14] *Social Security Administrative Law Judges: Survey and Issue Paper,* Ways and Means Committee Print 96-2, p. 3.

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decision makers in the same state DDS. In recent years, about 15 percent of reconsidered claims have been allowed. DSI eliminates this DDS reconsideration step and instead provides that appeals from initial DDS-level denials would be handled by an attorney known as a Federal Reviewing Official (FedRO).

The elimination of DDS-level reconsideration and the establishment of a FedRO are changes which provide an opportunity to address several longstanding issues with the disability adjudication process. However, it is crucial that this position be implemented properly and with adequate resources, as it otherwise has a potential to become yet another bottleneck in the process.

In August 1998, in one of our earliest reports on the disability program, we noted that the administrative structures of Social Security's disability programs are fragmented in a way that makes consistent and equitable decision making difficult to achieve. Initial decisions are made by over 50 DDSs administered by the states, the District of Columbia, and other jurisdictions, that also conduct reconsiderations. The FedRO position is an opportunity to have the first level of appeal handled by federally trained and supervised individuals who can ensure that agency policies are applied uniformly to all claimants.

DSI also requires ALJs' decisions to explain in detail why the ALJ agrees or disagrees with the substantive findings and overall rationale of the FedRO's decision. Some observers have seen this requirement as undermining the de novo nature of the ALJ decision and challenging the ALJ's independence. We understand this concern, but we do not think that a requirement to explain the reasons for agreement or disagreement with a prior decision in any way prevents independent decision making. In our studies of the disability program over the years, we have found a widespread and corrosive belief at each level of review that other levels are applying agency policy differently and inappropriately. Having each decision maker explain the reasons for agreement or disagreement with prior decisions should provide the agency the information needed to determine whether these beliefs are accurate and, if they are, to undertake the necessary training, policy clarification, or other measures needed to remedy the situation. It is essential to provide useful feedback if the overall process is ever to improve. The ALJ decision will provide that feedback to the FedRO only if it explains why it agrees or disagrees with the FedRO's findings and rationale.

If the FedRO position is ultimately successful, it should become the final decision point for the great majority of cases which are appealed from the initial DDS level. If the FedRO can stem the tide of cases flowing into the hearing level, SSA will have a chance to reduce its hearing backlogs and reduce the time that claimants have to wait for a hearing decision. For those claimants who continue to the hearing process, the FedRO's work should also be able to ensure that cases appealed further are essentially hearing ready. That result will be achieved only if the FedROs are both well trained in agency disability policy and well grounded in what is necessary to ensure that the case file and decisions will be legally sufficient, and if they have sufficient time and resources to do a complete job.

Decision Review Board

DSI eliminates the Appeals Council and establishes a Decision Review Board (DRB). Although these entities are superficially similar, this is a major change in the adjudicative structure. The Appeals Council functions primarily as the final step in the administrative

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appeals process. In 2005, it received over 89,000 requests for review, allowed about 2,500, and remanded about 25,000. Under DSI, claimants who are not satisfied with an ALJ decision would not have the right to request review by the new DRB except in very limited circumstances. The DRB will primarily review cases (both allowances and denials) that are selected for review on the basis of a profile of error-prone cases or that involve such issues as new or problematic policies. The DRB will be composed of ALJs and Appeals Judges. Because of their case review function, they will be in a good position to identify areas where unclear or misunderstood policy may be contributing to inconsistencies. Precedential decisions could be an important tool in increasing consistency. SSA should consider using the DRB to identify cases that clarify the correct handling of difficult issues and refer them to the new Disability Policy Council, which could issue them as precedential decisions.

We have long recommended the need to rethink the role of the Appeals Council, which seems to add little value relative to the resources it consumes. If these resources are applied to making improvements in the process at earlier stages and contribute to a better system for identifying and resolving policy issues at all levels, the result could and should be one in which the need for further review beyond the ALJ hearing level is substantially reduced.

Some observers have expressed concern that eliminating the Appeals Council will result in a flood of Social Security cases coming into Federal courts. In our earlier reports on the disability program, we have urged consideration of a separate Social Security court that could provide more expeditious review of disability appeals, eliminate the impact of such cases on the District Court workloads, and produce more uniform application of disability policy throughout the Nation. This remains an avenue that should be considered, particularly if the new adjudication process does not result in a decreased incidence of appeals beyond the hearing level.

Performance expectations

Part of piloting the new FedRO position in the Boston region will be establishing performance expectations for that position and adjusting performance expectations for ALJs. It is imperative that SSA demonstrate that it is serious about service delivery at all levels of the organization.

The FedRO's duties are comprised of case review, some development of the record and consultation with an expert, and then writing a decision. It appears that this is not that different from the current reconsideration process, apart from the requirement to write a more detailed decision rationale. On average, DDSs adjudicated reconsideration claims in 68 days in FY 2005. We believe that the primary responsibility of the FedRO position should be to ensure that the case is fully developed, and SSA should ensure that the FedROs have the necessary resources to do this. Thus, it would seem reasonable to expect that the FedRO may take a little longer to process cases than was true in the DDS. Target and threshold performance goals for the FedRO should be established and tested, along with quality standards that include accuracy, cost per case, and remand rates.

Implementing the FedRO position and phasing out the Appeals Council naturally impact the ALJ position. Some experts have expressed to the Board a concern that under DSI it may be even more difficult to receive a timely hearing decision. Their concern is that because ALJ decisions will be directly reviewed by the district court, it is quite possible that SSA will experience the unintended consequence of the ALJs issuing more detailed but fewer decisions.

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SSA should monitor its implementation of DSI carefully to ensure that this does not happen.

While it is important to ensure that claimants receive a hearing decision that represents the ALJ's independent best judgment as to how agency policy applies to the particular facts of the case, it is also a claimant's right to get a hearing decision within a reasonable time. SSA needs to use the implementation of DSI as an opportunity for re-crafting how work is done in the appeals process and to develop standards and clearer roles and responsibilities. If the FedRO position is responsible for developing the record, clarifying and/or narrowing the issues, and facilitating the hearings process, then the scope of work that is left to the ALJ can be refined. The ALJ would receive a properly and completely developed case and could generally be seen to have fulfilled the duty to ensure that the record is fully developed. The ALJ could then concentrate more fully on writing decisions that may be produced much more timely. In its implementation of DSI, SSA should measure carefully the extent to which ALJ duties and the time required for them changes. Many of the problems within the current process can, we believe, be traced back to a lack of accountability and to insufficient institutional measures to ensure timely and efficient customer service.

Eventually, SSA intends to screen ALJ decisions, using predictive screening tools and individual case record reviews to identify cases for referral to the DRB. The caseload will be comprised of favorable and unfavorable ALJ decisions that are likely to be error prone. During the initial implementation in the Boston region, the DRB will review all ALJ decisions. We caution that SSA should remember the lessons learned from prior unchecked growth in the Appeals Council workload. Without performance goals, there is a substantial danger that DRB backlogs will grow and caseloads will not be well managed.

The DSI regulations state that, if a claim is selected for DRB review, the notice of that selection will be furnished to the claimant at the same time that that ALJ's decision is released. The DRB has 90 days to review the ALJ's decision and if it fails to complete the review, the ALJ's decision will become final. (The Appeals Council currently has 60 days to finish its review of own-motion cases.)[15] While this establishes an outside limit, it does not really speak to a standard of acceptable performance, which presumably should be much shorter. Since these are pre-effectuation reviews, an allowance decision could be delayed up to another 90 days. Standards should be established to ensure that a 3-month delay is the exception, not the norm. Otherwise, it is highly likely that the processing time savings that are being culled from other parts of the adjudication process may be spent in this new review process.

Feedback and learning

One of the systemic problems in the current system is the lack of feedback between levels of adjudication. DSI provides for such feedback, although the specific mechanisms for that feedback have not yet been designed. A copy of FedRO decisions will be sent to the DDS that made the initial determination. A copy of the ALJ decision will be sent to the FedRO that made a decision in the case. And DRB decisions that disagree with ALJ decisions will be sent to the ALJ that issued the decision.

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[15] For this own-motion review, SSA's quality assurance component reviews a sample of hearing allowances, based on a profile of error-prone cases. It forwards to the Appeals Council those in which it disagrees with the hearing decision. If, after review, the Appeals Council agrees with the quality assurance assessment, it can reverse the decision or remand the case to the hearing office.

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Such feedback is essential to organizational learning, but it does not guarantee it. It provides a useful tool to improve quality and consistency, but it does not automatically effect those improvements. All levels of the disability adjudication process will need to develop methods and practices for absorbing and digesting that feedback. Feedback will have to be analyzed and used as a basis for management and training decisions and for ongoing review of how well adjudication practice is aligned with policy. This will take time and resources, but the potential for improving the process will make it time well invested.

Keys to successful implementation

DSI represents a response to a dysfunctional adjudication system that, despite the best intentions and hard work of thousands of Federal and state employees, exhibits unexplained inconsistency, has huge backlogs, and subjects many claimants to intolerable delays in reaching a final decision on their claims and appeals. The Board is generally supportive of the approach to restructuring that system reflected in DSI. However, we are concerned that merely changing the steps in the process will not in itself make a substantial difference. Even if, in the long run, the new process combined with the move to far greater use of electronic systems has the potential to reduce the need for resources, growing caseloads may offset much of any such savings. In the near term, moreover, the agency will have the daunting task of implementing a new adjudication system while continuing to operate an existing system that is nearly overwhelmed by its huge caseload and backlogs. The agency must seek and the Congress must provide adequate resources to meet the needs of both the evolving and existing systems, or the new system will not provide the results that are expected of it.

Beyond financial resources, however, the success or failure of the new adjudication structure will depend on how well the implementation is managed.

It is essential that good workload data and other management information be collected as the new processes are rolled out and that the information be used internally and made available publicly so that the new procedures can be carefully evaluated on an ongoing basis. In our discussions with interested parties, we found widely divergent viewpoints as to whether some of the past experiments with changed processes had succeeded or failed. Unfortunately, the agency had not produced the data and evaluations that would help to resolve those questions.

SSA should also refine and use the data it collects at earlier levels in the adjudication process to work more effectively at the hearing level. Such data could help identify types of cases that might be handled more expeditiously. For example, state agencies deny some claims because the impairment is not expected to last 12 months or more. By the time these cases reach the hearing level, the duration of the disability can be determined more easily. SSA could also look into refining its coding system at the state agency level to enable it to look for combinations of case characteristics that could indicate a greater likelihood of allowance.

Caution should be taken, however, in identifying cases that might be allowed quickly. Given the pressures of current backlogs, there might be too great a tendency to allow cases without a careful consideration of all factors. For the same reason, bench decisions, which can save processing time, should be monitored carefully.

In our 2001 report, *Agenda for Social Security*, we pointed out that the Social Security Administration has a strong institutional resistance to open discussion of the agency's

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problems. In implementing the new regulations, the agency must encourage prompt, frank, and open communication among all levels of the agency of problems that are encountered. The implementation of such significant changes to the complex SSA adjudication process will undoubtedly reveal a number of areas where adjustments need to be made. Those issues need to be identified and seriously considered. As necessary, midcourse corrections will have to be made. In undertaking changes of this magnitude, thorough, open, and honest communications are crucial.

Successful implementation will also require that SSA management not only listen to but actively address problems that are brought to their attention by sources within and outside the agency. We have repeatedly heard allegations that agency management has not been supportive of measures that might have lessened some of the problems the regulations seek to remedy. For example, we heard that ALJs feel that the agency discourages the use of subpoenas even though some judges find them to be an effective tool to overcome recalcitrance on the part of some providers. We heard that the agency is reluctant to require hearing offices to adopt best practices such as making claims files available for copying by representatives while they are awaiting assignment even though that seems to help address the problem of late submission of evidence. We also heard that ALJs believe that efforts to sanction representatives who do not properly carry out their responsibilities to claimants have often not been supported by higher management. Whether or not these particular allegations are correct, it does seem that there is fairly widespread perception that the management of the agency is not doing all that it can to provide the leadership and support that is needed to make the current system work better.

B. Use of technology

Electronic disability system

SSA's electronic disability (eDib) system promises to improve the productivity of the hearing process. By eventually eliminating paper folders and replacing them with electronic folders, eDib will reduce the time it takes to obtain information, eliminate the time it now takes to find and ship and store paper folders, eliminate the need to associate mail with paper folders, eliminate much of the work involved in preparing folders for hearings, simplify the scheduling of hearings, reduce photocopying, and automate the mailing of decisions.

The new system should make hearing offices more productive and reduce processing times. In many offices, the preparation of cases for hearing is a major bottleneck. Those offices could hold more hearings if more case files were prepared for hearing. By eliminating much of the time required to prepare case files, those offices will be able to hold more hearings and issue more decisions.

The work that is eliminated by eDib means that SSA may have the opportunity to redeploy some of the staff that has been doing that work, once backlogs are under control. In doing so, it should take into consideration staffing needs in all parts of SSA, not just in the hearing offices. It should also bear in mind the lessons from the unsuccessful Hearing Process Improvement (HPI) initiative that began in 2000. As part of HPI implementation, a number of employees were promoted to positions for which they were not adequately trained and which they were not able to perform well. Putting employees into positions in which they cannot succeed serves well neither the employees nor the agency. Any redeployments of personnel

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should consider the knowledge and skill requirements of the positions and provide what is needed to perform the positions successfully.

Video teleconference hearings

Video teleconferencing (VTC) also holds great promise for improving the productivity of the hearing process. SSA has made great strides in the use of VTC technology in the last few years. We encourage it to go even further. SSA reports conducting over 8,000 video hearings in 2004 and 25,000 in 2005. If VTC hearings continue at the rate they were conducted through May 2006, the last date for which we have data, it will conduct nearly 40,000 in 2006. This is excellent progress, but current regulations impede future progress.

In 2003, SSA issued regulations providing that ALJs could schedule hearings at which claimants would appear by video teleconference rather than in person. If claimants objected to the use of that technology, however, the regulations provided that SSA would reschedule an in-person hearing. We do not believe that provision is necessary.

Hearings have traditionally been held with all participants (claimants and any other parties, the ALJ, any representatives, witnesses, translators, or anyone else that the ALJ considers necessary) at the same location, either a hearing office or a remote hearing site. Remote hearing sites, generally at least 75 miles from a hearing office, are used to accommodate individuals who do not live near a hearing office. At the time SSA issued its regulations, about 40 percent of hearings were held at remote sites. The time and other resources that ALJs spend traveling to remote sites could be used in more productive ways.

Based on earlier experience in Iowa, SSA stated in 2003 that VTC hearings resulted in claimant satisfaction, savings in ALJ travel time, faster case processing, and a higher ratio of hearings held to hearings scheduled. SSA's 2003 regulations pledged that SSA would ensure that: the individual's access to the hearing record would be the same when appearing by VTC as it would if appearing in person; additional evidence could be transmitted and received between all locations and all participants; an assistant would be present at the VTC site to operate the equipment and provide any other needed help; and the audio and video transmission would be secure and the individual's privacy protected.

The comments we have heard on the use of VTC hearings have been overwhelmingly positive. We can understand that some claimants may be reluctant to adapt to an unfamiliar technology, but we see no reason not to require the use of VTC hearings whenever they can be scheduled. The technology obviously meets the requirements of due process, and it is in widespread use in other types of adjudications. Allowing claimants to veto its use in their cases reduces the productivity of the hearing process. It does not affect only their case but delays the decisions for others who are waiting for a hearing.

In issuing its regulations in 2003, SSA said that, based on its experience as of that time, it believed that VTC did not change adjudicative quality or change decisional outcomes. We recommend that it analyze its experience since that time and, if it continues to be positive, issue regulations requiring the use of VTC hearings wherever available.

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Decision writing software

We have heard very positive reactions to the new Findings Integrated Template (FIT) software that integrates findings of fact into the body of ALJ decisions. FIT seems to provide a structured and analytical format that lends itself to ALJs' thought patterns. The vision of the project is to provide a template for every category of decision. The software provides prompts to guide the writer through the analysis. By providing an analytical framework to ensure that all relevant issues are addressed, FIT should improve the quality of decisions and reduce the number of remands.

FIT started as a grassroots project, one of those initiatives that somehow manage to bubble up through a bureaucracy. It is a good example of the creativity in SSA's workforce and of the type of initiative that should be encouraged.

IV. Further Actions Needed

Selection process for ALJs

The Office of Personnel Management administers the government-wide selection process for ALJs. ALJs are employed at 29 Cabinet-level and independent agencies. As of December 2005, 1,429 ALJs were employed by the Federal government, of whom 1,176, or 82 percent of the total, worked for SSA. ALJs are selected from an OPM roster of qualified candidates based on passing a competitive test and evaluation of legal experience and judicial capability and temperament. OPM currently sends SSA 3 to 5 qualified candidates for each opening. Agencies hiring ALJs reimburse OPM for its cost of administering the selection process.

The work that SSA ALJs do in making decisions on claims for benefits can be distinguished from that done by ALJs at regulatory agencies, such as the Securities and Exchange Commission or the Federal Communications Commission. SSA ALJs handle many more cases and make many more decisions than those in regulatory agencies. They therefore have different skill requirements that should be reflected in a separate selection roster for ALJs who make individual benefit decisions. Not everyone on the current register meets those skill requirements. As a HOCALJ told us, "A difficult thing about hiring new ALJs is finding ones who are not shocked about processing 60 cases a month." Demonstrated ability to manage a large docket should be a selection factor for the position.

OPM has resisted suggestions to establish specific qualifications for different types of ALJs, from a belief that qualified candidates should be able to quickly learn specific agency-related subject matter. OPM also argues that it is in the government's interest to have a mobile workforce of ALJs. It is not a question of subject matter, however, but of skill and ability to perform work in a different manner. In view of the fact that SSA employs more than 4 out of 5 ALJs and pays most of the costs of the selection process, the statute should be changed to enable SSA to conduct its own selection process to meet its unique needs. SSA should use data on quality and quantity of decisions of current SSA ALJs to identify characteristics of judges with high quality and quantity and develop a selection process that uses those characteristics.

As an alternative, OPM could continue to maintain a single register of qualified candidates but provide SSA with a greatly expanded certificate of qualified candidates, together

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with supplementary information on the candidates' demonstrated ability to manage a large docket that SSA could use in making selections. It has been argued that the intent of the Administrative Procedure Act in 1946 was to have the Civil Service Commission (since succeeded by OPM) establish qualifying requirements and have the agencies select from among all applicants meeting those requirements. [16]

ALJ pay issues

ALJs are paid 1 of 3 levels of basic pay, designated AL-1, AL-2, and AL-3. Within AL-3 there are 6 rates of basic pay, designated A through F. With the approval of OPM, agencies may establish positions at AL-1 and AL-2 when they involve significant administrative and managerial responsibilities. At SSA the Chief Administrative Law Judge is paid at AL-1. The Deputy Chief ALJ and the Regional Chief ALJs are paid at AL-2. Line ALJs and HOCALJs are paid at AL-3. An ALJ who begins service at AL-3/A (ALJs may begin at a higher rate because of prior service or superior qualifications) automatically advances to rates B, C, and D of AL-3 upon completion of 52 weeks of service in the next lower rate, and to rates E and F upon completion of 104 weeks of service in the next lower rate. An ALJ would therefore progress from AL-3/A to AL-3/F in 7 years. As of September 2005, 72 percent of all ALJs were at AL-3/F.

An agency may, on a 1-time basis, with the approval of OPM, advance an ALJ 1 rate within AL-3 upon taking a position with added administrative and managerial duties and responsibilities, such as that of HOCALJ.

Rates of Pay for Administrative Law Judge Positions
Effective January 2006

AL-1	$152,000
AL-2	$152,000
AL-3/F	$148,526 to $152,000
AL-3/E	$140,425 to $152,000
AL-3/D	$132,098 to $151,070
AL-3/C	$123,885 to $141,677
AL-3/B	$115,588 to $132,154
AL-3/A	$107,457 to $122,889

Like most Federal employees, ALJs receive locality pay, which accounts for the ranges in the table above, in addition to their base pay. The combined base pay and locality pay of an ALJ is capped by statute at Executive Level III ($152,000). Because ALJs quickly reach their pay ceiling, with the addition of locality pay, about 43 percent of ALJs government-wide are currently paid at the capped rate.

OPM reports that it has seen no evidence that this pay compression has resulted in significant recruitment or retention problems. We have been informed that OPM would be interested, however, in applying pay for performance to the ALJ position, which would raise the

[16] See Antonin Scalia, "The ALJ Fiasco – A Reprise," 47 *University of Chicago Law Review*, 57 (1980). Scalia wrote that the system of "hiring 'by the numbers' into an effectively life-tenured job . . . is a horror story of personnel management which should come to an end."

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pay ceiling and result in higher pay for at least some ALJs. The possibility of pay for performance should be carefully explored, with due care for the need to provide adequate protections for decisional independence.

Whatever is done for overall ALJ pay, some additional incentive is needed to recruit and retain HOCALJs in SSA. We recommend a revision to the pay scale to add a percentage to be specified to the pay of an AL-3 HOCALJ, in recognition of the additional duties of that job. AL-1 and AL-2 pay rates also need to be adjusted to ensure the availability of the best candidates for Chief ALJ and Regional Chief ALJ positions.

Management structure and roles

The new structure of the Office of Disability Adjudication and Review (ODAR) shows promise for improving the hearing process. ODAR is that part of SSA that is responsible for the FedRO process, the hearing process, the Appeals Council, and the Disability Review Board. In the new structure, the Chief ALJ now reports directly to the Deputy Commissioner for Disability Adjudication and Review, instead of reporting, as previously, to an associate commissioner who in turn reported to a deputy commissioner. One of the Chief ALJ's major duties is maintaining effective channels of communication between the deputy commissioner and the RCALJs and the ALJ corps. Elevating the Chief ALJ position shortens that chain of reporting and should enhance communication.

We are also encouraged that the new ODAR structure includes a Division of Planning and Evaluation that is charged with conducting a comprehensive ODAR-wide program of studies and analysis of the application of and compliance with SSA and ODAR policies and procedures in all phases of its processes and the quality of results achieved. Implementing a national program requires compliance with national policies and procedures, and compliance will not be achieved without regular, data-driven scrutiny of operations.

In terms of local management structure, a de facto dual management structure of the hearing process results in confusion and lack of accountability. As an RCALJ told us, "While technically the HOD [Hearing Office Director] reports to the HOCALJ, in practice the 2 structures are parallel." Lack of clarity about lines of authority dilutes accountability and breeds confusion among employees. Lines of authority need to be simplified and roles need to be clarified at the hearing office level.

The HOCALJ position is challenging. The HOCALJ is not only a manager but also a working ALJ, often among the most productive ALJs. Management is an important function, and to the extent that workloads allow, HOCALJs should be encouraged to reduce the number of hearings they conduct in order to allow time to perform their management role. The position is of critical importance in the hearing process, the linchpin between higher management and those who directly serve the public. No matter how well the overall process is structured, the work will not be done well unless the HOCALJ does his or her job well.

The agency, therefore, needs to provide HOCALJs with the tools and supports they need to do their job well. One of those supports is training. Many HOCALJs come to the job with little previous management experience. The 1-week course that they are currently offered seems inadequate. It is also given infrequently (just once in FY 2006), so that a new HOCALJ might not be trained for months. An RCALJ told us, "Too often, a manager will run up against union

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problems and decide to leave the HOCALJ position since they were not properly prepared for how to deal with such situations." New HOCALJs should be provided with self-instructional materials on labor management relations and other nuts and bolts subjects that they are likely to need before they can get to formal training. They should also be given information on types of support that are available from regional and national staffs, whom they can call and when to call. New HOCALJs also need broader training on their new role, including training on leadership theories and practices, teambuilding, and interpersonal communication. HOCALJs should also be brought together regularly, on either a regional or a national basis, for refresher training and to exchange ideas, information, and best practices. Perhaps most importantly, they need to operate in an environment that encourages and supports their efforts to implement effective management of their offices.

In addition to the revision of the pay scale recommended above, there are some other, non-pay, incentives that could make the HOCALJ position more attractive. In view of the demands of the job, HOCALJs could be authorized to carry over from year to year annual leave in excess of the standard maximum of 240 hours. HOCALJs should also be given preference for attending agency-paid training at the National Judicial College, the OPM Management Development Centers, or other appropriate management training.

There also seems to be a lack of clarity about the role of the ALJ. We have heard that some ALJs do not follow some Social Security regulations in making their decisions, and the lack of consistency in decisions noted above lends credence to these reports. The problem seems to be more than a few scattered individuals. For example, an ALJ told us, "Often ALJs are trained well on the Social Security regulations at their initial training, only to go to the hearing office and be told that the office doesn't do things that way. ALJs go to these hearing offices that have a bad culture and are beaten down." Another ALJ told us, "Local practices often create a lot of problems when they don't follow the regulations."

ALJs are employees of SSA, not Article III judges. The Social Security Act gives the Commissioner authority to adjudicate claims in order to determine entitlement and eligibility for benefits. The ALJ's authority derives from that authority given to the Commissioner; the ALJ makes decisions on behalf of the Commissioner. The ALJ, therefore, is to apply the agency's policies as laid out in rules, regulations, and other policy statements. That role should be made clear to prospective ALJs before they are hired.

Increased accountability

SSA's implementation of multilevel appraisal systems for its managers and for employees under its contract with the American Federation of Government Employees is a step in the right direction. It should be expanded to all parts of the hearing process. Appraisals should, to the extent possible, be based on quantifiable performance data, including both quality and quantity of work performed.

Unlike almost all other Federal executive branch employees, ALJs are excluded from the civil service performance appraisal system. They are also exempt from the standard requirement that new competitive service employees serve a probationary period and may not receive monetary or other awards. The reason for these exemptions is to protect the interests of claimants and the public by insulating ALJs from any agency pressures that might influence their decisions. On the other hand, the agency should be expected, in the interests of claimants and

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the public, to manage the hearing process to ensure that it is consistent and efficient.

We believe it is possible, with an appropriate statutory change, to reconcile the interests of the public to both an independent decision and to a process that is consistent and efficient.[17] The Chief ALJ would be charged with developing case processing guidelines, working with the ALJ union, agency managers, and others. These guidelines would address goals for production and time goals for steps in the hearing process. The Chief ALJ would delegate the duty of conducting regular (at least annual, preferably more frequent) performance reviews based on these guidelines. Other elements of these reviews would include judicial comportment and demeanor, as well as adherence to law, regulation, and binding agency policy. The reviews need not involve a numerical rating or ranking but should provide useful feedback on performance. The Chief ALJ would also be responsible for developing training and counseling programs to deal with performance problems identified in the performance reviews and to issue reprimands or recommend disciplinary action as appropriate.

To protect against any interference with their qualified decisional independence, the agency should establish a system to investigate allegations from ALJs of such interference and to take appropriate action. OPM would have oversight responsibility for this activity and could review the agency's response to allegations and recommend further action. ALJs would also continue to have the other protections for decisional independence that are provided by statute: the fact that their pay is set in accordance with OPM guidelines and that the agency must establish good cause, after providing an ALJ with an opportunity for a hearing before the Merit Systems Protection Board, before taking any adverse action against an ALJ.

We recognize that this recommendation is controversial, but we think it should be pursued. For the present, in the absence of such a performance appraisal system, the agency still has the responsibility to use the tools currently available to it to see to it that the public has a hearing process that is fair, consistent, and efficient. The HOCALJ has the primary day-to-day responsibility for carrying this out. As we stated above, among his or her more specific duties, the HOCALJ is to: provide leadership and guidance to all hearing office employees, including ALJs, for the purpose of improving the hearing process and achieving the goals and objectives of the agency; provide advice and guidance to ALJs in substantive program policy and procedural matters relating to the adjudication of cases under the Social Security Act; supervise directly the ALJs, the supervisory staff attorney, and the hearing office director; and provide technical and procedural guidance for the expeditious processing of pending cases.

To accomplish these duties, the HOCALJ needs to monitor the management information available and provide those in the hearing office the information they need to monitor their own work. All hearing office staff should regularly be provided with data that allow them to compare their own performance with that of all those in the same position in their own office and with

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[17] The following discussion follows a recommendation of the Administrative Conference of the United States, which can befound at http://www.law.fsu.edu/library/admin/acus/305927.html.

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other offices in the region and the nation.[18] HOCALJs should also do post-decisional reviews of samples of cases and discuss the results with ALJs to provide helpful feedback. Hearing offices should use the feedback they receive from later parts of the process to improve their performance, and HOCALJs should ensure that performance is monitored to ensure adherence to agency policy.

In dealing with performance problems, managers should ensure that employees have the knowledge and skills required to perform at expected levels. Training should be made available to meet identified performance needs; time should be made available for it; and employees who need it should be required to take it. Performance problems that continue should be dealt with by progressive disciplinary measures.

It is important to balance the public's interest in efficiency with its interest in consistency and fairness. Pressures for quantity of production can result in declines in quality. For that reason, reasonable production standards that address both quality and quantity should be developed for all aspects of the hearing process, with the input of employees involved and of their representatives.

Training

In any service delivery organization, the knowledge and skills of its employees are essential to good performance. Since ALJs are a key position in the hearing process, it is essential that they have the knowledge and skills they need. New ALJs currently are assigned to a hearing office, where they go through some assigned activities with a mentor before going to training. The training class lasts 4 weeks and is followed by additional activities in the hearing office with the mentor. About a year after their initial class, they are brought back together for an additional week of training. Some judges also get 3 additional days of docket management training at some later point in their career.

The training that ALJs receive is probably enough to get them started on the job, but we believe they need additional skill development and ongoing professional development. We have been told that it takes about 9 months for a new ALJ to get up to speed. Some additional skill training may help shorten the learning curve. While the OPM selection process ensures that new ALJs are experienced attorneys, it does not ensure that they have all the skills they need to be efficient judges. They probably have experience in analyzing and presenting cases, and the selection process ensures that they can write a decision. But it is not likely that they have experience managing a large docket of cases. At least for most new ALJs, it would be helpful to receive training on docket management during their first few months on the job. Docket management training is now given only to some judges and only later in their career. This training is given as budget allows to classes of about 30 ALJs, and in fiscal year 2006 only 2 classes were conducted.

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[18] While we do not recommend making performance information public, there is precedent for doing so in the judicial branch. The Administrative Office of the United States Courts publishes twice a year a report showing, by U.S. district judge and magistrate judge, the number of motions pending, bench traials that have remained undecided, and civil cases pending more than a specified time.

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Continuing professional development is also important. The subject matter that ALJs deal with is complex, and even experienced ALJs can and should continue to learn. SSA does some such continuing training. Some training is prepared in response to needs identified by peer reviews and other types of feedback, some in response to changes in systems and procedures. Attendance at some training is compulsory.

One SSA official with whom we discussed continuing professional development replied, "A lot of interactive video training is available; there is a lot of training out there." It is good to put it out there, but we do not believe it is used as it should be. ALJs should develop an annual training plan, to be approved by their HOCALJ. The ALJ should commit to taking training of a specified type, and local management should commit to seeing to it that training is not just available, but used.

Training is also important for other positions in the hearing process. There is an established national program of classroom training for HOCALJs, decision writers, hearing office directors, group supervisors, legal assistants, and case intake specialists. We understand the difficulties of logistics and budget involved in delivering classroom training. Ideally, such training should be delivered as soon as possible after an employee begins a new job. When that is not possible, other types of training, job aids, mentoring, and supports should be in place to enable employees to perform at an adequate level.

Abbreviations used in this report

AC	Appeals Council
ALJ	Administrative Law Judge
DDS	Disability Determination Services
DRB	Decision Review Board
DSI	Disability Service Improvement
eDib	Electronic Disability
FedRO	Federal Reviewing Official
FIT	Findings Integrated Template
HOCALJ	Hearing Office Chief Administrative Law Judge
HPI	Hearing Process Improvement
ODAR	Office of Disability Adjudication and Review
OPM	Office of Personnel Management
SSA	Social Security Administration
SSR	Social Security Ruling
VTC	Video teleconferencing

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Social Security Advisory Board

Establishment of the Board

In 1994, when the Congress passed legislation establishing the Social Security Administration as an independent agency, it also created a 7-member bipartisan Advisory Board to advise the President, the Congress, and the Commissioner of Social Security on matters relating to the Social Security and Supplemental Security Income (SSI) programs. The conference report on the legislation passed both Houses of Congress without opposition. President Clinton signed the Social Security Independence and Program Improvements Act of 1994 into law on August 15, 1994 (P.L. 103-296).

Advisory Board members are appointed to 6-year terms, made up as follows: 3 appointed by the President (no more than 2 from the same political party); and 2 each (no more than 1 from the same political party) by the Speaker of the House (in consultation with the Chairman and the Ranking Minority Member of the Committee on Ways and Means) and by the President pro tempore of the Senate (in consultation with the Chairman and Ranking Minority Member of the Committee on Finance). Presidential appointees are subject to Senate confirmation.

Board members serve staggered terms. The statute provides that the initial members of the Board serve terms that expire over the course of the first 6-year period. The Board currently has 2 vacancies. The Chairman of the Board is appointed by the President for a 4-year term, coincident with the term of the President, or until the designation of a successor.

The Chairman of the Board is appointed by the President for a 4-year term, coincident with the term of the President, or until the designation of a successor.

Hal Daub, Chairman

Hal Daub is currently a partner in the law firm of Blackwell Sanders Peper Martin in Omaha, Nebraska and Washington, D.C. Previously, he was President and Chief Executive Officer of the American Health Care Association and the National Center for Assisted Living. He served as Mayor of Omaha, Nebraska from 1995 to 2001, and was an attorney, principal, and international trade specialist with the accounting firm of Deloitte & Touche from 1989 to 1994. Mr. Daub was elected to the U.S. Congress in 1980, and reelected in 1982, 1984, and 1986. While there he served on the House Ways and Means Committee, the Public Works and Transportation Committee, and the Small Business Committee. In 1992, Mr. Daub was appointed by President George H.W. Bush to the National Advisory Council on the Public Service. From 1997 to 1999, he served on the Board of Directors of the National League of Cities, and from 1999 to 2001, he served on the League's Advisory Council. He was also elected to serve on the Advisory Board of the U.S. Conference of Mayors, serving a term from 1999 to 2001. From 1971 to 1980, Mr. Daub was vice president and general counsel of Standard Chemical Manufacturing Company, an Omaha-based livestock feed and supply firm. A former U.S. Army Infantry Captain, he is a Distinguished Eagle Scout, 33rd Degree Mason, is active in the Salvation Army, Optimists International and many other charitable and philanthropic organizations. He is the current chairman-elect of the Community Health Charities of America. Mr. Daub is a graduate of Washington University in St. Louis, Missouri, and received his law degree from the University of Nebraska. Term of office: January 2002 to September 2006.

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Dorcas R. Hardy

Dorcas R. Hardy is President of DRHardy & Associates, a government relations and public policy firm serving a diverse portfolio of clients. After her appointment by President Ronald Reagan as Assistant Secretary of Human Development Services, Ms. Hardy was appointed Commissioner of Social Security (1986 to 1989) and was appointed by President George Bush to chair the Policy Committee for the 2005 White House Conference on Aging. Ms. Hardy has launched and hosted her own primetime, weekly television program, "Financing Your Future," on Financial News Network and UPI Broadcasting and "The Senior American," an NET political program for older Americans. She speaks and writes widely about domestic and international retirement financing issues and entitlement program reforms and is the co-author of *Social Insecurity: The Crisis in America's Social Security System and How to Plan Now for Your Own Financial Survival*, Random House, 1992. A former CEO of a rehabilitation technology firm, Ms. Hardy promotes redesign and modernization of the Social Security, Medicare and disability insurance systems. Additionally, she has chaired a Task Force to rebuild vocational rehabilitation services for disabled veterans for the Department of Veterans Affairs. She received her B.A. from Connecticut College, her M.B.A. from Pepperdine University and completed the Executive Program in Health Policy and Financial Management at Harvard University. She is a Certified Senior Advisor and serves on the Board of Directors of Wright Investors Service Managed Funds, and First Coast Service Options of Florida. First term of office: April 2002 to September 2004. Current term of office: October 2004 to September 2010.

Barbara B. Kennelly

Barbara B. Kennelly became President and Chief Executive Officer of the National Committee to Preserve Social Security and Medicare in April 2002 after a distinguished 23-year career in elected public office. Mrs. Kennelly served 17 years in the United States House of Representatives representing the First District of Connecticut. During her Congressional career, Mrs. Kennelly was the first woman elected to serve as the Vice Chair of the House Democratic Caucus. Mrs. Kennelly was also the first woman to serve on the House Committee on Intelligence and to chair one of its subcommittees. She was the first woman to serve as Chief Majority Whip, and the third woman in history to serve on the 200-year-old Ways and Means Committee. During the 105th Congress, she was the ranking member of the Subcommittee on Social Security. Prior to her election to Congress, Mrs. Kennelly was Secretary of State of Connecticut. After serving in Congress, Mrs. Kennelly was appointed to the position of Counselor to the Commissioner at the Social Security Administration. As Counselor, Mrs. Kennelly worked closely with the Commissioner of Social Security, Kenneth S. Apfel, and members of Congress to inform and educate the American people on the choices they face to ensure the future solvency of Social Security. Mrs. Kennelly served on the Policy Committee for the 2005 White House Conference on Aging. Mrs. Kennelly received a B.A. in Economics from Trinity College, Washington, D.C. She earned a certificate from the Harvard Business School on completion of the Harvard-Radcliffe Program in Business Administration and a Master's Degree in Government from Trinity College, Hartford. Term of office: January 2006 to September 2011.

David Podoff

David Podoff was a senior advisor to the late Senator Daniel Patrick Moynihan on Social Security and other issues while serving as Minority Staff Director and Chief Economist for the Senate Committee on Finance. While on the Committee staff he was involved in major legislative debates with respect to the long-term solvency of Social Security, health care reform, the constitutional amendment to balance the budget, the debt ceiling, plans to balance the budget, and the accuracy of inflation measures and other government statistics. Prior to serving with

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the Finance Committee he was a Senior Economist with the Joint Economic Committee and the directed various research units in the Social Security Administration's Office of Research and Statistics. He has taught economics at the Baruch College of the City University of New York, the University of Massachusetts and the University of California in Santa Barbara. He received his Ph.D. in economics from the Massachusetts Institute of Technology and a B.B.A. from the City University of New York. Term of office: October 2000 to September 2006.

Sylvester J. Schieber

Sylvester J. Schieber is Vice President/U.S. Director of Benefits Consulting at Watson Wyatt Worldwide, where he specializes in analysis of public and private retirement policy issues and the development of special surveys and data files. From 1981 to 1983, Mr. Schieber was the Director of Research at the Employee Benefit Research Institute. Earlier, he worked for the Social Security Administration as an economic analyst and as Deputy Director at the Office of Policy Analysis. Mr. Schieber is the author of numerous journal articles, policy analysis papers, and several books including: *Retirement Income Opportunities in An Aging America: Coverage and Benefit Entitlement, Social Security: Perspectives on Preserving the System* and *The Real Deal: The History and Future of Social Security*. He served on the 1994 - 1996 Advisory Council on Social Security. He received his Ph.D. from the University of Notre Dame. First term of office: January 1998 to September 2003. Current term of office: October 2003 to September 2009.

Members of the Staff

Joe Humphreys, Staff Director
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The Early Days of the Hearing Process

When the Social Security Act was passed in 1935, it had no provision for a hearing process for Old Age and Survivors Insurance. In 1936, however, the staff of the Social Security Board began an extensive study to devise such a process. After the 1939 amendments to the Act required the agency to provide hearings to dissatisfied claimants, it was prepared to move forward. As of March 1940, the first 12 hearing officers, or referees as they were called then, had been selected and were in training.

The system that was put in place in 1940 resembles today's system in outline, but was quite different in some ways from today's highly legalized and high volume system that deals mainly with disability claims. Of the first 12 hearing officers, for example, only 3 had law degrees and 2 more had some legal training. The U.S. Attorney General's Committee on Administrative Procedure commented, "The referees are chosen for their qualities as hearing officers and for their qualifications as representatives of the Board who meet the public."

The volume of claims was also small when the system began. Through August 1940, only 70 requests for hearing had been received. Referees held 15 hearings that month and rendered decisions in 6. Timeliness was not a problem. In 1946 the average hearing was held within 30 days of the hearing request, and the decision was rendered within 2 weeks of the hearing.

Despite a $10 cap on attorney fees, by 1946, attorneys were representing claimants in about one sixth of hearings.

Consistency, however, was a concern in the design of the system. One of the basic provisions adopted by the Social Security Board in 1939 dealt with the coordination of decisions. It stated that, "during the developmental state of the hearing and review system," in cases where they were in doubt or were inclined to reverse the agency's decision, they were to submit their proposed findings and conclusion to a consulting referee at the Appeals Council for his review and recommendation. Although they were not required to follow that recommendation, if they did not do so, their decision would be reviewed by the Appeals Council. The Attorney General's Committee on Administrative Procedure called this provision "an ingenious and novel device for securing the benefits of decentralized adjudication, at the same time avoiding chaotically conflicting decisions."