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Social Security ALJs in the crosshairs

By **PATRICIA MANSON**
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Social Security judges are taking it on the chin.

In the last few years, the 7th U.S. Circuit Court of Appeals has been blasting administrative law judges for the way they handle claims for Social Security disability benefits.

The court alleges ALJs tend to cherry-pick facts, fail to consider the impact of such conditions as obesity or mental illness on an applicant's overall condition and discount testimony of pain that isn't backed up by objective evidence.

The court in a ruling last month, for example, wrote that an ALJ's opinion denying an application for disability benefits was "riddled with errors" — including one mistake that was "well-nigh incomprehensible." *Jamie L. Adaire v. Carolyn W. Colvin*, No. 14-1116.

The opinion, like many others critical of Social Security ALJs, was written by Judge Richard A. Posner.

He spoke about the Social Security claim process Thursday before The Chicago Bar Association's Social Security Law Committee.

The 7th Circuit sees the same shortcomings in "case after case after case" in which ALJs deny applications for disability benefits, Posner said.

However, he said, the jurists who review the opinions before an appeal reaches the 7th Circuit generally overlook these shortcomings.

The review by the Social Security Administration's Appeals Council tends to be "very perfunctory," Posner said.

He said federal trial judges, who are the next step in the process, also tend to rubber-stamp ALJs' decisions.

Appeals then go to the 7th Circuit.

"We hear a lot of appeals, and we reverse a lot," Posner said.

One error ALJs make, he said, is assuming that someone who does housework or cares for his or her children is not disabled.

"That's a very great misunderstanding, because when you're at home, you schedule your activities," he said.

In fact, Posner said, some of these people are still in the workforce.



Richard A. Posner

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“They’re working out of desperation,” he said. “They’re still totally disabled.”

ALJs also “are very uncomfortable about mental disease” and its effect on a person’s condition, Posner said.

“Mental diseases can be very seriously disabling even if a person isn’t a raving maniac and needs to be put in a straitjacket,” he said.

Other problems include ALJs’ tendency to “give very little weight to obesity,” he said, and their tendency to believe applicants are exaggerating if testimony about pain they’re in isn’t supported by X-rays or other objective evidence.

And vocational experts present what are “essentially fictitious numbers” when testifying about the jobs available to an applicant seeking disability benefits, Posner said.

Chairman Frank G. Tuzzolino of Frank G. Tuzzolino & Associates introduced Posner before he spoke to the CBA committee.

Afterward, Tuzzolino described Posner’s remarks as “insightful and thought-provoking.”

Posner’s criticisms echoed complaints that lawyers who represent applicants for Social Security disability benefits have been making for years.

Two of those lawyers, Mark D. DeBofsky of DeBofsky & Associates P.C. and Barry A. Schultz of The Law Offices of Barry A. Schultz P.C. in Evanston, are pleased the 7th Circuit is taking those complaints seriously.

“In the past five years, there’s been a real increase in the percentage of remands from the court,” Schultz said.

He said the 7th Circuit “is requiring that administrative law judges be practical.”

That includes realizing that a person can be in severe pain despite the lack of objective evidence, Schultz said.

Being practical, he said, also includes getting all the facts and looking at the big picture.

“You have to be realistic in the way you’re looking at these things,” he said. “You can’t just take isolated points.”

In the last few years, Schultz said, the 7th Circuit has been reversing more than half the denials of benefits that it considers. That figure is at about 70 percent over the past 15 months, he said.

While the San Francisco-based 9th Circuit also has criticized Social Security ALJs, Schultz said, “the 7th Circuit has been most vocal in recent years.”

Like Schultz, DeBofsky praised the 7th Circuit’s handling of appeals brought by people denied disability benefits.

The court’s judges, particularly Posner, have applied common sense in considering those appeals, DeBofsky said.

He said the late Gerald W. Heaney, who served on the St. Louis-based 8th Circuit for nearly 40 years, did more than any other judge to make the claim process fair to applicants for Social Security disability benefits.

Posner, he said, “has probably done more for Social Security claimants than any other living judge.”

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In his remarks to the CBA committee, Posner reserved some of his criticism for lawmakers.

He noted that the Social Security Administration is severely understaffed.

“It results in tremendous delays,” he said.

The “obvious answer” to these delays, he said, would be to hire more ALJs.

“But I gather Congress would not appropriate the money,” Posner said. “Congress is very stingy about many of the agencies.”

ALJs themselves are not happy with their workload. They contend they are burdened by growing dockets — which, in turn, are the result of an aging population and high unemployment — and a lack of resources.

And they contend the Social Security Administration has made them the scapegoats for the resulting delays in resolving claims.

In a lawsuit filed in federal court in Chicago in 2014, three ALJs and the union that represents them alleged the Social Security Administration is interfering with its judges’ independence by requiring them to decide at least 500 claims for disability benefits a year.

But U.S. District Judge Sharon Johnson Coleman ruled Congress had taken away the courts’ jurisdiction to preside over such personnel disputes when it enacted the Civil Service Reform Act of 1978.

In affirming Coleman’s decision in January, the 7th Circuit described what the ALJs claim is a quota as a goal. *Association of Administrative Law Judges, Judicial Council 1, IFPTE, AFL-CIO & CLC, et al. v. Carolyn W. Colvin*, No. 14-1953.

But writing for the majority, Posner likened the ALJs’ situation to that of workers on a poultry-processing assembly line when the conveyor belt speeds up.

If someone is expected to do more work in the same amount of time, Posner wrote, “the quality of his output would decline.”

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