Post-Hearing Questions for the Record
Submitted to Marilyn D. Zahm
Administrative Law Judge
Buffalo, New York Office of Disability Adjudication and Review
U.S. Social Security Administration
From Chairman James Lankford

"Examining Due Process in Administrative Hearings"
May 12, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1. Your written testimony offers alternatives to SSA's proposal to transfer these entire classes of cases from ALJs to non-APA adjudicators.

Q: What about AALJ's plan makes it a better solution in terms of the backlog, efficiency, costs and due process concerns?

A. The Agency has stated that it cannot hire enough ALJs this fiscal year because of OPM's lack of available applicants; as a result, the Agency asserts, it must turn to another source to obtain adjudicators to handle the backlog of hearings.

AALJ's plan envisions using a cadre of approximately 30 ALJs located throughout the country to specialize in non-disability cases. The cadre can be composed of current ALJs and Senior ALJs.

There is an available source of experienced ALJs that the Agency is ignoring – retired ALJs who would welcome the opportunity to return to the Agency for part time, temporary employment as Senior ALJs and make it unnecessary to hire Attorney Examiners/AAJs who would need extensive training to do this work.

At a recent meeting, management representatives stated that there was money budgeted for employing only the usual 20 Senior ALJs. However, the Agency could switch the funds it intends to use to hire its proposed additional Attorney Examiners/AAJs to the Senior Judge account and thus be able to hire additional Senior Judges.

Reasons why AALJ's plan is a better solution:

Unlike the Attorney Examiner/AAJs that the Agency plans to hire, ALJs are already trained to handle non-disability hearings; no significant additional training would be required for the cadre.

The Agency will have to buy and install expensive equipment at the Appeals Council to accommodate the video hearings that the Attorney Examiners/AAJs would be holding. Under the AALJ's plan, no additional equipment would needed, as ALJs are already located in hearing offices that are equipped with all necessary infrastructure to facilitate video hearings.

Attorney Examiners/AAJs, all of whom will be located in the Washington, DC area, will have to travel to hold hearings for those claimants who decline to have their hearings held by use of video technology. As these cases will be scattered across the country, these claimants may wait a longer time if an Attorney Examiner/AAJ needs to accumulate a docket of cases in order to make travelling efficient; if the Attorney Examiner/AAJ has to make a separate trip for each individual case, the time and resources to hear this caseload will be substantial. Travel for ALJs, who are already located in field offices, will not be as burdensome. In addition, ALJs in the cadre can add these non-disability cases onto a docket of regular disability cases and hear them quicker. It is more efficient to use the current ALJ structure than to build a new, parallel program operated out of headquarters in the Washington, DC area.

As Dean Krent's legal analysis provided to the Subcommittee sets out, the Attorney Examiner/AAJ plan does not follow the Agency's own regulations. Moreover, its plan violates the Administrative Procedure Act (APA), which requires that APA judges hear APA cases. Although the Agency has, at times, taken the position that the APA does not apply to Social Security cases, there is a substantial body of law and opinion that establishes otherwise. Finally, the claimants whose cases are adjudicated by Attorney Examiners/AAJs will lose their right to appeal an adverse decision to the Appeals Council.

2. The recent proposal to transfer classes of ALJ cases appears to be just the latest of several attempts by SSA management to gradually erode ALJ independence as a short cut to solving the hearings backlogs, instead of doing the hard work of hiring more ALJs. Other examples include: the expansion of the Attorney Examiner position description to include holding hearings and significant travel in March 2016; the removal of references to the APA and independence in the

latest ALJ position description update in 2013; and SSA management pleading an inability to find enough qualified ALJ candidates while leaving ostensibly qualified ALJ candidates on the register.

Q: Is there a long-standing, sustained effort by SSA management to gradually erode ALJ independence and/or replace them with non-APA adjudicators more susceptible to management influence? Please explain.

Replacement of ALJs

A. With regard to replacing ALJs with non-ALJs in adjudicating cases, the only instance where the Agency has taken any concrete, public steps to do so has been the recent attempt to have Attorney Examiners/AAJ hear and decide cases. However, about ten or twelve years ago, the Agency did have the intention to replace the ALJs with non-ALJs to adjudicate cases, but abandoned the plan, because of opposition, before it was made public.

Judicial Independence

There has been a sustained effort by SSA management, particularly over the past few years, to erode ALJ independence. One of the most telling actions was the change in the ALJ Position Description (PD) in 2013, referenced above, when the Agency, without notice to AALJ, petitioned OPM for significant changes to the PD, including removing all references to the APA, having Hearing Office Chief Administrative Law Judges provide "supervision" to ALJs regarding their adjudicatory work (as opposed to previously providing only administrative oversight), and requiring ALJs to comply with ill-defined "agency policies" that have not been properly promulgated through the notice and comment rulemaking procedure required by the APA.

The Agency has compromised judicial independence in other significant ways. A few examples are set out below:

- Pressuring ALJs to schedule an unreasonably high number of hearings, more than can be adjudicated properly; this requires many ALJs work at an unreasonable pace to meet the quota. The new "expectation" we believe to be under consideration now is for each ALJ to issue a minimum of 600 dispositions annually – which would allow for a Judge to spend about two hours per case, including reading and developing the record (which may contain 1000 or more pages of medical evidence), holding a hearing and questioning witnesses,

drafting decisional instructions, and editing the decision. Because of the "expectation," the potential for incorrectly decided cases has been created.

- Requiring ALJs to adhere to policies that have not been promulgated through the APA's notice and comment rulemaking procedures;
- Failing to rotate case assignments among ALJs in violation of the APA;
- Reducing staff support, which negatively impacts the ALJ's ability to develop the record fully by, among other things, obtaining documentary evidence and issuing interrogatories and subpoenas;
- Intercepting, reviewing and critiquing the ALJ's decisional instructions and returning them to the ALJ for substantial revisions;
- Allowing decision writers to change the ALJ's findings of fact;
- Removing cases from ALJs without good cause; e.g., reassigning a case from an ALJ (who wanted a medical expert to testify at a hearing) to a management judge, who paid the claim without any hearing or expert witness testimony at all, in order to dispose of the case before the end of the fiscal year.

I cannot emphasize enough the negative impact that the lack of time and resources to perform adjudicatory duties has on judicial independence. ALJs are a highly skilled and motivated group who take seriously their oath of office, strive to do their best for the American public, and put in many hours of uncompensated time to accomplish their work. It is impossible to have judicial independence, which presupposes the Judge making an informed decision based upon fully examining the record, holding a full and fair hearing, and applying the law, regulations and rulings, in an environment that does not permit the ALJ adequate time or staff assistance to handle an overwhelming caseload. The cost to the American public for an incorrect decision as a result of this environment is enormous. Each case paid has a potential price tag of approximately $300,000. Equally as important is the failure to award benefits to deserving claimants.

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Submitted to Marilyn D. Zahm
Administrative Law Judge
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From Senator Heidi Heitkamp

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May 12, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
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1. Your testimony was very helpful in explaining the "who, what, when, and where" elements of SSA's proposed action, but was not as clear on the underlying "why and how" of this development. You and those you represent are clearly opposed to this proposal for several reasons. We share your concerns about due process.

- **What are the underlying tensions between SSA management and ALJs? What are the major points of disagreement between SSA and the AALJ in relation to decisional autonomy, productivity, efficiency? In your opinion, what steps should your organization and SSA take to resolve these issues?**

  The underlying tensions between SSA management and the ALJs have existed for decades and, in general, involve judicial independence, inefficient operation of the adjudicatory system and unrealistic and onerous caseload quotas.

  The Office of Disability Adjudication and Review (ODAR), the component of SSA that houses ALJs and the Appeals Council, is an adjudicatory system that is not, but should be, run as an adjudicatory system or court. Management officials who are not adjudicators do not have the same appreciation for due process or the proper workings of an adjudicatory system as ALJs have, which leads to administrative expediency trumping legality.

  Judicial independence

  ALJs have judicial independence within the framework of the law, regulations and rulings. Management ignores the Administrative Procedure Act's requirements for Notice and Comment Rulemaking and instead implements policies without going through those procedures, and then improperly seeks to bind ALJs to those policies.

  Consistent with the APA's provisions guaranteeing judicial independence, an agency is not permitted to subject ALJs to performance evaluations or appraisals, nor can ALJs be awarded bonuses.

In late 2013, without notice to the AALJ, management changed the ALJ Position Description so as to direct ALJs to adhere to Agency policies, which included those that had not been promulgated pursuant to APA procedures. In addition, ALJs now, for the first time, were to be "supervised" in their adjudicatory duties by Hearing Office Chief Administrative Law Judges. In its submission of the proposed amended Position Description to the Office of Personnel Management (OPM), management had removed all references to the APA, clearly signaling its intent to subordinate ALJs to Agency managers. However, and to its credit, OPM restored the APA reference.

There is ongoing tension between the Agency and its ALJs, with the Agency constantly seeking to control the decision-making process. The following are examples:

- Pressuring ALJs to schedule an unreasonably high number of hearings, more than can be adjudicated properly; this requires many ALJs to work at an unreasonable pace to meet the quota. The new "expectation" we believe to be under consideration now is for each ALJ to issue a minimum of 600 dispositions annually – which would allow for a Judge to spend about two hours total per case, including reading and developing the record (which may contain 1000 or more pages of medical evidence), holding a hearing and questioning witnesses, drafting decisional instructions, and editing the decision. Because of the "expectation," the potential for incorrectly decided cases has been created.
- Requiring ALJs to adhere to policies that have not been promulgated through the APA's notice and comment rulemaking procedures;
- Failing to rotate case assignments among ALJs in violation of the APA;
- Reducing staff support, which negatively impacts the ALJ's ability to develop the record fully by, among other things, obtaining documentary evidence and issuing interrogatories and subpoenas.
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I cannot emphasize enough the negative impact that the lack of time and resources to perform adjudicatory duties has on judicial independence. ALJs are a highly skilled and motivated group who take seriously their oath of office, strive to do their best for the American public, and put in many hours of uncompensated time to accomplish their work. It is impossible to have judicial independence, which presupposes the Judge

making an informed decision based upon fully examining the record, holding a full and fair hearing, and applying the law, regulations and rulings, in an environment that does not permit the ALJ adequate time or staff assistance to handle an overwhelming caseload. The cost to the American public for an incorrect decision as a result of this environment is enormous. Each case paid has a potential price tag of approximately $300,000. Equally as important is the failure to award benefits to deserving claimants.

Also of great concern is the failure of Agency management to engage in meaningful discussion with ALJs before implementing new programs. Often these programs are developed and implemented by individuals who have little, if any, experience adjudicating cases. Some of these failed initiatives come at a great cost to the American public; a recent example is the electronic bench book, which cost twenty-five million dollars and is only used by about 300 ALJs.

Inefficient Operation

A normal adjudicatory system is organized so as to provide support to the Judge, as it is the Judge who is the point of production. However, ODAR operates for the benefit and convenience of the clerks and representatives and requires Judges to perform clerical and other non-judicial acts. Only Judges can hear and decide cases. They should not be encumbered with other duties and assignments if the Agency's primary goal is to have them issue decisions and reduce the backlog.

Every ALJ needs dedicated clerical and attorney support in order to be productive. In many hearing offices, management has stripped the ALJs of their assigned clerical support, causing them to have to spend time and energy following up on case-handling directives and searching for a staff member to provide needed assistance with such matters as equipment malfunctions. Moreover, management has reduced the number of attorneys and decision writers assigned to the hearing offices and placed this support in centralized locations. As a result, ALJs do not know who is drafting their decisions, have little to no contact with them, and must spend hours, at times, editing poorly crafted decisions.

The lack of rules of practice (see the answer to question three below) impedes the smooth operation of the adjudicatory process. SSA holds more adjudicatory hearings than any other court system, yet has no rules of procedure for those who practice before it. The submission of evidence in a timely fashion to permit the Judge and expert witnesses proper time to review the evidence and the closure of the record are two critical measures that are missing. There are no rules that preclude a representative from appearing at the hearing with new documentary evidence (often hundreds to thousands of pages). The ALJ must take the time to review that evidence prior to the hearing – which causes a backup with all of the other hearings scheduled for that day – or adjourn the hearing, which means that the case cannot be adjudicated for many more months, until an opening

in the Judge's docket is available. If a medical expert has been scheduled, it will be difficult or impossible to provide the new evidence to the doctor in a timely fashion, again, requiring that the hearing be continued to a future date in order to take the doctor's testimony after the new evidence has been reviewed. Even worse, representatives can, and do, submit medical documents and other evidence after the hearing, which delays the case and sometimes requires a supplemental hearing. All of these problems hinder ALJs in reaching and rendering decisions and could be resolved if the Agency would only enact regulations requiring both the submission of all evidence substantially prior to the hearing date and the closing of the record at the conclusion of the hearing.

In addition, representatives should not be permitted to submit duplicative documents or exhibits that are not organized in chronological order. Sometimes as much as twenty percent of the medical evidence consists of duplicate documents. Because medical evidence in a case may consist of thousands of pages, duplicates bulk up the record and lengthen the ALJ's review. Representatives are paid for their work; they should assist the claimants and the adjudicatory process by making it easier for the ALJ to quickly review the record.

If the adjudicatory system were to be organized in a way so as to improve case processing, more cases could be heard, more claimants served, and more decisions issued in a timely fashion. The above are simple solutions that will enhance the ability of the ALJs to perform their duties.

Improper Quotas

The Agency currently has a de facto caseload quota – called an "expectation" or "goal" – of having each ALJ issue 500 to 700 dispositions per year. The quota is based not on any empirical data regarding the length of time it actually takes to adjudicate a case, but, rather, on the need to dispose of pending cases given the available number of ALJs employed. There is now some indication that the minimum "expectation" may rise from 500 to 600 dispositions annually because of the increasing backlog, even as the size of case files grows and management imposes ever greater demands for decisional quality.

In the past, the quota and the push for numbers created an environment where it was more important for ALJs to issue large numbers of decisions as opposed to applying the law and rendering correct decisions. The fall-out from that period continues to be felt and has tarnished the reputation of the Agency.

The AALJ commissioned a work study analysis conducted by an internationally known expert, Leaetta M. Hough, Ph.D., to determine the time needed to adjudicate a case if the ALJ follows all Agency policies and requirements. Dr. Hough concluded that the figure of even 500 dispositions per year was unrealistic. The Executive Summary of the study is attached.

(attached)

The Agency needs to reduce its quotas and provide sufficient clerical and attorney support for ALJs so that they may adjudicate cases ethically and fairly.

Steps to resolve these issues

Greater attention needs to be paid by the Agency to the suggestions and recommendations of its ALJs. We are highly educated and highly skilled. Many of us have held management positions with government and non-government agencies and with private businesses. As lawyers and Judges, we know how an adjudicatory system should work and we would like to make our system work properly and for the benefit of the American people.

- Are you aware of *any* SSA plan to transfer any other type of cases away from ALJs to AAJs/AEs on the Appeals Council? Can you identify any specific actions SSA has taken to undermine ALJ independence?

  I am not aware of any SSA plan to transfer any other types of cases – besides the non-disability and remanded cases at issue now - away from ALJs to AAJs/AE on the Appeals Council.

  Specific actions taken by SSA to undermine ALJ independence are set forth above in response to the prior question.

2. Let's assume SSA were to accept and implement your recommendation to establish a cadre of ALJs nationwide to handle non-disability cases and divert all of the Appeals Council administrative and clerical support resources towards that cadre of 3 ALJs per region.

- How would such a proposal reduce appeal hearing backlogs and decision average wait times?

  A specialist cadre would be more efficient and speed up the processing of the non-disability cases, thus leaving more time for other Judges to handle the disability caseload. Travel expenses and time would be reduced as these Judges are already out in the field and not all located in the Washington, DC area.

  Unlike the Attorney Examiner/AAJs that the Agency plans to hire, ALJs are already trained to handle non-disability hearings; no extensive additional training would be required for the ALJ cadre.

The Agency's plan requires it to buy and install expensive equipment at the Appeals Council offices to accommodate the video hearings that the Attorney Examiners/AAJs would be holding. Under the AALJ's plan, no additional equipment would need to be purchased and installed, as ALJs are already located in hearing offices that are equipped with all necessary infrastructure to facilitate video hearings.

Attorney Examiners/AAJs, all of whom will be located in the Washington, DC area, will have to travel to hold hearings for those claimants who decline video hearings. As these cases will be scattered across the country, these claimants may wait for a longer time if an Attorney Examiner/AAJ needs to accumulate a docket of cases in order to make travelling efficient; if the Attorney Examiner/AAJ has to make a separate trip for each individual case, the time and resources to hear this caseload will be substantial. Travel for ALJs, who are already located in field offices, will not be as burdensome. In addition, ALJs in the cadre can add these non-disability cases onto a docket of regular disability cases and hear them more quickly. It is more efficient to use the current ALJ structure than to build a new, parallel program operated out of headquarters in the Washington, DC area. Finally, there is a significant risk of a class action lawsuit resulting in the return of all of these cases to ALJs for hearing. This, of course, will further increase the backlog.

3. What is the most important adjudicatory process reform that can be undertaken today without an Act of Congress?

The Agency must enact rules of practice by regulation that, among other things, would require representatives to:

- provide evidence substantially prior to the hearing;
- submit documents in chronological order;
- restrict exhibits to those documents which are related to the claimant's disability;
- remove duplicate documents;
- submit a memo outlining all severe and non-severe impairments, specifying the limitations arising from each, citing the exhibit number and page which supports these assertions, and outlining all opinion evidence in the record;
- set forth a specific prayer for relief, well in advance of the day of the hearing, so the ALJ does not have to spend time studying records in the file that are no longer relevant to the time period in issue;
- stop re-opening and re-litigating prior closed and non-appealed prior decisions; the same periods of time can be re-litigated multiple times under current rules.
- And, absent extraordinary circumstances, the record should be closed as of the day of the hearing.

2015 No. 052 Executive Summary

HumRRO
HUMAN RESOURCES RESEARCH ORGANIZATION

Administrative Law Judge Work Analysis Study

Executive Summary

Prepared for:	The Association of Administrative Law Judges	**Prepared under:**	Contract Agreement dated Nov 7, 2014 Work Order 3 dated Oct 14, 2015
Authors:	Cheryl Paullin, Ph.D., HumRRO Leaetta M. Hough, Ph.D., Dunnette Group Joseph Caramagno, HumRRO	**Date:**	November 12, 2015

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Administrative Law Judge Work Analysis Study

Executive Summary

Social Security Administration (SSA) Administrative Law Judges (ALJs) are expected to process adult disability cases as efficiently as possible to reduce the Agency's case backlog and produce timely decisions for claimants. ALJs are also expected to render *high quality legally sufficient decisions.* Numerous Agency policies and memoranda from the Office of the Chief Administrative Law Judge (OCALJ) emphasize that ALJs must carefully read all case materials, make every reasonable effort to obtain relevant evidence for each case, and write well-documented decisions explaining their ruling.

These are not unreasonable expectations. However, the SSA's Office of Disability and Adjudication Review (ODAR) has implemented production quotas that appear to be based entirely on reducing the case backlog and reducing the number of days it takes for claimants to receive a ruling on their case. The quotas appear to have been set without regard to the amount of time (hours) required for an ALJ to carefully process adult disability cases.

One benchmark that ODAR has set is the requirement that each ALJ schedule a certain number of hearings per month. This benchmark is enforced by linking it with the opportunity for the ALJ to telework.

A February 18, 2014 memo from Chief Administrative Law Judge Debra Bice provided this rationale for the benchmark:

> *Considering the necessity for quality, timely, and policy compliant hearings and decisions, and historical data, **scheduling** an average of at least fifty (50) cases for hearing per month will **generally** signify a reasonably attainable number for the purposes of this contractual provision. I want to emphasize that this provision concerns the number of hearings **scheduled**, not cases heard or dispositions issued. Accordingly, if you **schedule** at least an average of fifty (50) cases for hearing per month during a twelve-month rolling cycle, then management generally will determine you have scheduled a reasonably attainable number of cases for hearing for the purposes of this contractual provision. Conversely, if you schedule fewer than an average of fifty (50) cases for hearing per month during a twelve-month rolling cycle, then management likely will determine you have not scheduled a reasonably attainable number of cases for hearing, unless there are extenuating circumstances.* [Author note: Bold, underlined print appeared in the original.]

The **scheduled hearings benchmark** was officially implemented on October 1, 2015. It is being phased in across 3 successive 6-month telework cycles. For the first 6-month cycle, ALJs who wish to telework must schedule 40 hearings per month, on average, or face restrictions on their eligibility to telework. The benchmark increases to 45 scheduled hearing per month, on average, for the 2nd telework cycle, then to 50 scheduled hearings per month, on average, for the 3rd and all subsequent telework cycles.

Another performance standard ODAR established relates to **case disposition**. Specifically, since 2007, each ALJ is expected to achieve 500-700 case dispositions per year. Dispositions include cases that are dismissed and cases for which the ALJ renders a decision (favorable/award or unfavorable). The SSA's public data archive shows that, for the past three

fiscal years, 18% of cases were dismissed, leaving 82% requiring an ALJ's decision. Some portion of case decisions can be made on-the-record (OTR) which means that the ALJ is able to render a favorable decision based entirely on reading the case file without conducting a hearing although the ALJ must still read the entire case file and write a decision. (Data on the percentage of OTR decisions issued per fiscal year is not, apparently, publically available although experienced ALJs report that the percentage of OTR decisions issued per fiscal year is very small.)

Each of the preceding metrics may be very relevant for tracking and monitoring organizational- or unit-level performance, but the process by which the quotas were established for individual ALJs appears not to relate to actual ALJ work requirements. Performance standards for ALJs should take into account the amount of time realistically required to do all of the activities involved in adjudicating cases such as reading the case file, conducting a hearing, developing additional needed information about the case, drafting decision instructions for a decision writer, and editing the draft decision. Performance standards should also take into account other work activities, such as engaging in professional development and training, and performing general case management and office duties, that ALJs must do in addition to processing adult disability cases.

The Association of Administrative Law Judges (AALJ) contracted with Human Resources Research Organization (HumRRO) and its subcontractor, the Dunnette Group, Ltd., in the fall of 2014 to study the amount of time and factors involved in adjudicating adult disability cases. We designed and completed a *work analysis* study to capture the type of information necessary to create performance standards for ALJs. It is the only study to date that uses a work analysis approach to gather information about the amount of time required for ALJs to process adult disability cases.

Work analysis has a long tradition in the fields of industrial-organizational psychology, industrial engineering, human factors, and human resources. It provides the foundation for personnel performance management systems. The design involved identifying the many work activities that ALJs must perform – experienced ALJs helped us identify activities that ALJs do when adjudicating adult disability cases and to identify other work activities ALJs perform. One commonly used work analysis approach is to simply survey job incumbents about time spent on various work activities. In this study, it was important to estimate time spent for a range of easy to difficult cases. Therefore, we designed a simulated case processing task and accompanying survey to collect information from ALJs about how long it takes to perform case processing and other activities. To standardize ALJs' frame of reference in rating time spent on case processing, we asked them to read and render a decision on each of three recent closed cases that varied in length. Thirty-one (31) ALJs read the entire case files, rendered a decision, wrote decision instructions and recorded their time. They then estimated the amount of time they spend on the other adult disability case processing phases as well as professional development and training, general case management, and office duties.

Assuming that the ALJ carefully complies with SSA directives regarding legally sufficient decisions, our study shows that it takes 5.69 hours of ALJ labor, on average, to render a decision for a case that is 206 pages in length. As shown in the Executive Summary Table 1, it takes 7.09 hours to render a decision for a case that matches the FY2014 national case size average of 652 pages. Finally, it takes 8.60 hours, on average, to render a decision for a lengthy case (1,065 pages). As a point of comparison, in FY2014, the majority of adult disability cases consisted of more than 500 pages and 12% of them consisted of more than 1,000 pages.

We calculated the number of hours ALJs could spend processing each case if they rendered 500 decisions per year. Our study indicates that, after subtracting authorized rest breaks, holidays, and annual leave, and the average number of work hours ALJs spend on activities such as professional development and training, ALJs have about 2.5 hours, on average, to spend on each case if they render 500 decisions per year. This seems nearly impossible given that it takes on average a little more than 5½ hours for ALJs to render a legally sufficient decision for a short case (206 pages), slightly more than 7 hours to render a legally sufficient decision for a case of average size (655 pages), and a little more than 8½ hours to render a legally sufficient decision for a long case (1065 pages).

We understand that the annual quota of 500-700 case dispositions includes both dismissals and decisions, and that about 18% of cases are dismissed. Clearly, dismissals would require less than 5.69 (or 7.09 or 8.60) hours to process. Still, the dismissal rate would have to be much higher than 18% to reduce the average time available per case for those that require a decision to only 2.5 hours.

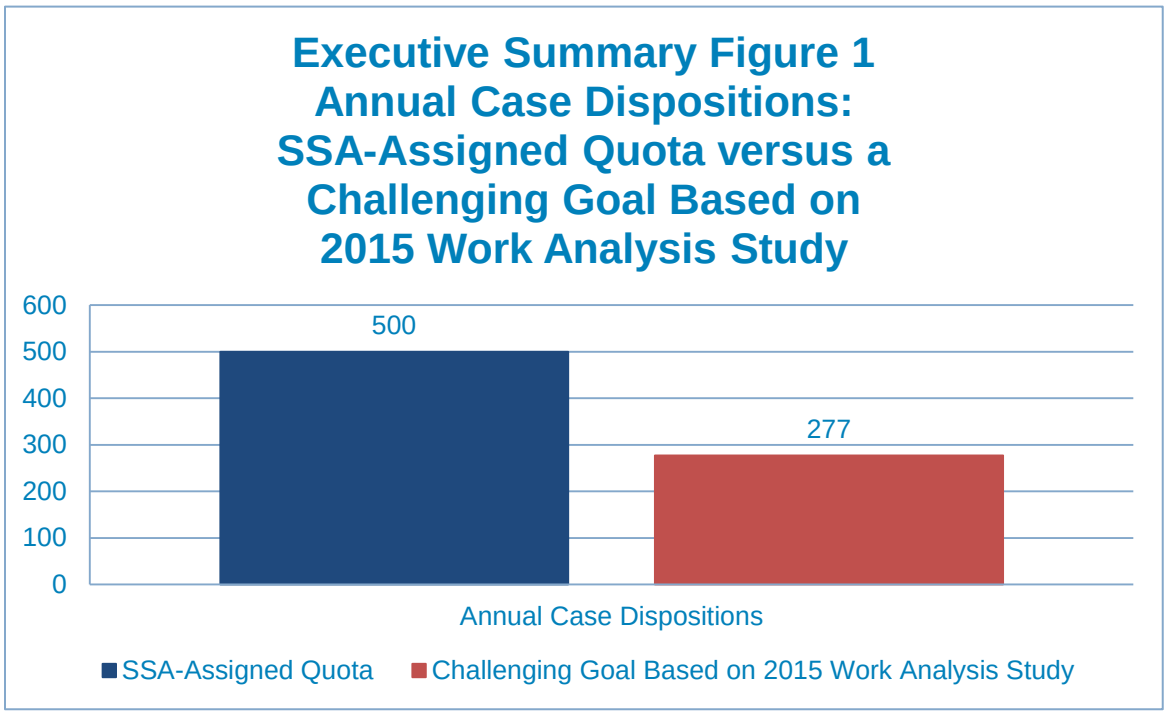
Executive Summary Table 1. Amount of Time Needed to Render a Decision per Case Based on 2015 Work Analysis Study versus Amount of Time Available per Case to Render 500 Decisions in a Year

	Case Size		
	Short (206 pages)	**Average (655 pages)**	**Long (1065 pages)**
Time required, on average, to render a decision in accordance with SSA directives regarding legally sufficient decisions	5.69 hours	7.09 hours	8.60 hours
Time available per case, on average, for full-time ALJ after accounting for rest breaks, holidays, leave, and other work activities that ALJs perform	2.5 hours	2.5 hours	2.5 hours

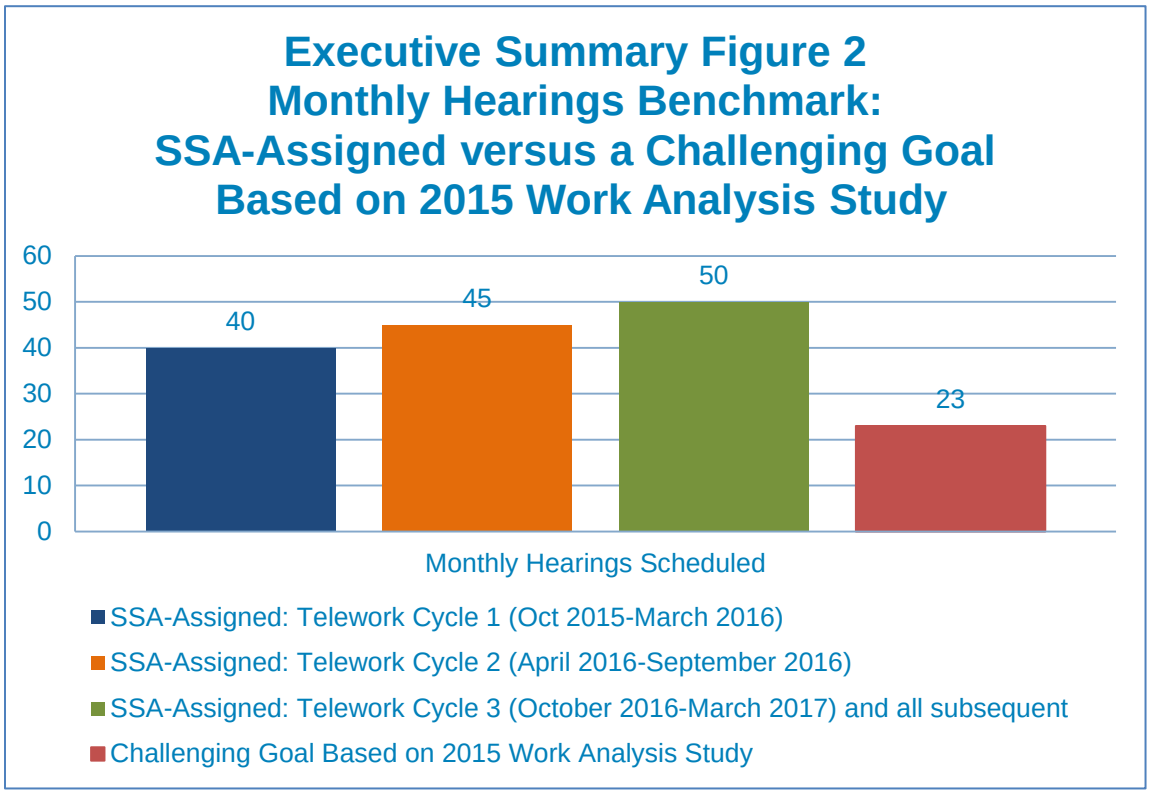
Note. Data in first row are based on work analysis study in which 31 ALJs adjudicated the same three closed case files. Data in the second row was calculated by subtracting time spent on authorized rest breaks, federal holidays, authorized annual leave, and work activities unrelated to adjudicating specific cases from the 2,087 work hours available in a year for full-time federal government employees.

Next, we calculated the number of adult disability cases of average size that each ALJ could reasonably decide in a year, after taking into account that ALJs, like other federal government employees, have authorized rest breaks, holidays, and annual leave time, and spend work time on activities such as professional development and training, general case management activities, and general office duties – activities separate from processing individual cases.

The work analysis study data indicate that the number of case decisions that an ALJ could render ranges from 70 to 342 per year (with an average of 191 and a median of 195), assuming a case of average size and following SSA policy directives regarding legally sufficient decisions. A challenging goal could be set higher than the average decision rate, but not so high that most ALJs could not reach it. Among the ALJs in the work analysis study, 25% could render decisions for at least 233 cases per year (this is the 75th percentile in the distribution). Thus, a challenging annual goal for ***case decisions*** is 233 cases per year. A challenging goal for ***case dispositions*** is 277 per year, assuming that the national dismissal rate continues to be 18% of all cases. Executive Summary Figure 1 illustrates the results.



Our work analysis study also provides data relevant to the monthly benchmark for scheduling hearings. Using an annual case disposition goal of 277, a challenging *monthly benchmark for scheduling hearings* would be 23 hearings on average per month (277 ÷ 12) as shown in Executive Summary Figure 2.



The challenging goals we describe are lower than current SSA-assigned quotas which are (a) 500-700 case dispositions per year and (b) an average of 40 scheduled hearings per month (with the amount increasing to 50 hearings per month within 18 months). Our work analysis study suggests that the ***SSA scheduling benchmark of 40 hearings per month, on average, is not reasonably attainable if SSA policy directives regarding legally sufficient decisions are followed.***

We understand that some ALJs are able to achieve the annual case disposition quota and the hearings scheduled benchmark. They are powerfully motivated to do so for a variety of reasons, including the following:

- SSA management *expects* ALJs to meet the case disposition production quota unless, in conjunction with their manager, it is determined that there are good reasons why an ALJ should not be required to meet it (e.g., *Social Security Disability Programs,* May 17, 2012*; Social Security Disability Programs,* September, 13, 2012; U.S. SSA OIG, 2010).
- ALJs can be counseled or disciplined if their performance does not meet management expectations for the number of case dispositions they should be able to achieve.
- Productivity data for each ALJ is available to the public through SSA data archives. ALJs with lower productivity levels may be subject to negative publicity or public pressure. (For example, see http://www.ssa.gov/appeals/DataSets/archive/03_FY2015/03_September_ALJ_Disposition_Data.html.)
- ALJs who wish to telework must meet monthly case scheduling benchmarks or they may face restriction on their ability to telework. (See memos from Chief Administrative Law Judge Bice [February 18, 2014; Appendix C] and from HOCALJ Walters [July 17, 2015; Appendix D])

Years of research on goal setting clearly shows that, in many different types of jobs and educational settings, people accomplish more when they work toward specific, difficult goals, as opposed to having no goals at all or only broad, ambiguous goals such as “do your best” (Locke & Latham, 2013). Certainly, SSA has established specific, difficult production and hearings scheduled goals for ALJs. However, goal attainment is also strongly impacted by the extent to which individuals commit to achieving the goals and believe they have the ability and the resources necessary to accomplish them.

Our work analysis study indicates that the SSA’s goals would be very difficult for many ALJs to meet. Kerr and LePelley (2013) report that stretch goals can have a positive impact on performance, but only if people accept them and believe they can be accomplished. If people do not believe they can achieve stretch goals, their motivation and performance often decreases.

Another danger associated with establishing easily counted goals, such as the number of case dispositions and number of hearings scheduled, is that these goals may conflict with an equally important but harder to count goal, namely, decision quality. This is the classic speed-quality tradeoff. SSA requires ALJs to maximize both speed and quality goals. As far back as 1975, Steven Kerr published an article in the Academy of Management Journal entitled, “*On the folly of rewarding A, while hoping for B*” (Kerr, 1975). For ALJs, it appears that the SSA is rewarding case processing production (A) while hoping for high quality decisions (B).

In an article entitled “*Goals gone wild: The systematic side effects of overprescribing goal setting*,” Ordóñez, Schweitzer, Galinsky, and Bazerman (2009) showed that goal setting can

lead to unintended side effects such as neglect of all nongoal areas, increasing the incidence of unethical behavior, corrosion of organizational culture, and reduced motivation among employees, among others. It appears that, over the past few years, the SSA has already experienced some of these unintended side effects including excessively high allowance rates for some ALJs, too many decisions containing errors or of low quality, and low morale among ALJs.

Our study also sheds some light on one likely way in which ALJs accomplish the monthly hearings scheduled benchmark and annual case disposition quota – by working uncompensated hours. According to two independent samples of 31 and 98 ALJs, many ALJs work outside of normal work hours, on holidays, and in lieu of using their authorized annual leave. Most use less than ¼ of their authorized sick leave. Why would they do this? Likely because they care deeply about producing high quality decisions and because they are under tremendous pressure to meet the annual case disposition production quota and the monthly scheduled hearings benchmark.

In conclusion, our study indicates that the requirement to schedule 40 cases per month, on average, is not reasonably attainable, nor is it reasonable to expect ALJs to achieve 500-700 case dispositions annually while also complying with SSA directives on legally sufficient decisions. Obviously, opinions could vary about how challenging "reasonably attainable" goals should be, and some might prefer more or less stringent challenges. The point is that a ***work analysis approach*** **can provide the necessary foundation for an informed discussion about where benchmarks and goals should be set.**

Our study developed and piloted a solid methodology for ALJ work analysis. While our data are based on responses from a relatively small number of ALJs, it is the only study to our knowledge that attempts to establish production goals *based on the amount of labor required to actually adjudicate cases.*

If the SSA conducts its own work analysis study, it could:

- Perform a qualitative study of case processing practices used by the most productive ALJs *who are also producing legally sufficient decisions.*
- Carry out a simulated case processing study similar to the one we designed only with a larger sample of ALJs.
- Develop a modeling tool to estimate the number of cases that ALJs can reasonably process taking into account (a) proportion of cases likely to be dismissed, (b) proportion of likely OTR decisions, (c) case size, (d) case complexity, (e) competence of available decision writers, and (e) assumptions about the number of work hours available for case processing.

We understand that this study would not be easy, but the necessary research could be done. It could start with the variables that we examined, and then add more as they become available. Importantly, the modeling tool should be dynamic, because the factors listed in the third bullet above can and do vary over time and differ across regions and HOs.

Finally, our study also generated ideas and changes in the current SSA ALJ work situation that would reduce the amount of ALJ time needed to adjudicate adult disability cases. SSA could pursue these and other ideas to increase the efficiency of ALJs.

Post-Hearing Questions for the Record
Submitted to Joseph Kennedy
Associate Director for Human Resources Solutions
U.S. Office of Personnel Management
From Senator Heidi Heitkamp

"Examining Due Process in Administrative Hearings"
May 12, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1. Your testimony was very helpful in explaining the systemic challenges OPM and SSA face in recruiting and hiring enough ALJs to keep pace with attrition and the increasing hearing backlog.

- SSA has testified about the difficulties it's having in hiring enough ALJs from OPM's registry of eligible and qualified candidates. Drawing upon your experience with other Federal agencies employing ALJs, does OPM have any specific recommendations for SSA to overcome this challenge?

  OPM: The Social Security Administration (SSA) is doing a substantial amount of ALJ hiring. We are providing additional candidates both to meet SSA's and other agencies' short-term hiring needs and to meet SSA's projected hiring needs for the next few years. We have added staff in order to be able to keep the examination open longer and process more candidates. Also, we have discussed with SSA ways to better streamline the process. We have made a number of suggestions that may help quicken the process of bringing new ALJs on board and has helped to decrease the loss of ALJs soon after their arrival at SSA to other agencies.

  In addition, during 2015, OPM took steps to expand the group of candidates who had been permitted to take the remainder of the 2013 administration of the ALJ examination, based on their performance on the Online assessment, which allowed several hundred more applicants to complete the first general administration of the current version of the examination. Applicants who successfully completed the balance of the examination were then added to the register.

  Prior to opening the second general administration of the current ALJ exam, in the spring of 2016, OPM worked with SSA and the other ALJ-hiring agencies to revise the list of locations where agencies have offices and to permit SSA to define a location as a full county, providing greater flexibility in the location of new offices. We also applied those changes to those applicants already on the register. This process will enable agencies to fill positions where they have actual need while also providing updated notice to applicants as to where the ALJ positions are located.

We also are reviewing past hiring actions to determine whether there are further efficiencies that could be achieved in the hiring process and whether there might be ways to improve upon the design of the examination when the current examination is retired.

Post-Hearing Questions for the Record
Submitted to Joseph Kennedy
Associate Director for Human Resources Solutions
U.S. Office of Personnel Management
From Chairman James Lankford

"Examining Due Process in Administrative Hearings"
May 12, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1. Based upon the information you have provided, there were over 5,000 applicants in the spring 2016 round of ALJ hiring. Your testimony noted that there is a year-long, rigorous process ALJ candidates must go through before qualifying for the register and noted the stringent standards of which are evident in there being only 600 candidates currently on the ALJ register.

Q: Is OPM's selection process in fact so rigorous that only about a tenth of applicants make it on to the final register? If not, what percent of applicants are ultimately successful?

OPM: No. Regarding the number of Administrative Law Judge (ALJ) candidates, the number discussed at the hearing was the number of candidates *currently* on the register, not the total number of individuals who have been on the register since the first administration of the exam. As a result, the number does not include the candidates who have already been hired by agencies since the register opened. The ALJ register is not static. As noted, candidates go off the register when they are appointed to an actual ALJ position. Also, certain applicants eligible for veteran's preference may reopen the examination upon demand between general administrations; those who successfully complete the examination and receive a final numerical rating are then added to the register. The number provided at the hearing was a snapshot in time, after two full years of hiring by ALJ-employing agencies. When the administration and scoring of the examination that opened in March 2016 has been completed, many new candidates will be added to the register.

The selection process that the U.S. Office of Personnel Management (OPM) uses in evaluating ALJ applicants is based on the competencies that are needed for ALJ positions, which we feel is appropriately rigorous. However, there are several other factors that affect the number of applicants who make it on to the final register.

Initially, OPM reviews the preliminary qualifications of the applicants, many of whom do not meet those preliminary qualifications or do not provide information to substantiate them. This is not a question so much of the rigor of the examination as it is of applicants' failure to note and follow the requirements of the position. For example, we get applications from individuals who

have no legal training. Some applicants choose not to complete the required assessments at each stage of the selection process and are excluded from further consideration of their own volition.

In addition, we use a cut score to screen out applicants after the online component has been administered. Only those applicants in the higher-scored group at the time of the online component are allowed to move on to the other components. The proportion permitted to move forward is based on the projected hiring estimates OPM collects from ALJ-employing agencies. This screening is undertaken so as to avoid having many more candidates on the register than agencies will ever need, which is costly and could also discourage some applicants from continuing to compete for ALJ positions. OPM can adjust this factor if agency projections change in the interim.

In 2015, Social Security Administration (SSA) advised OPM of its need to accelerate their ALJ hiring to manage their growing backlog. When OPM became aware of this change, we adjusted the initial cut score and permitted many additional candidates to move past the online component and be assessed for inclusion on the register. This adjusted cut score serves as the threshold for the general administration of the examination that opened in March 2016. That change should net proportionately more candidates than were initially allowed to go forward in 2013.

Q: What strategies has OPM considered to recruit applicants who are more likely to make it through the ALJ qualifying process?

OPM: Please see the response above – OPM has the ability to permit more candidates to make it through the process because it can adjust the initial cut score, and has already done so.

Regarding recruitment strategies, prior to opening each ALJ Job Opportunity Announcement for a general administration of the examination, OPM issues a press release, posts a notice for public viewing on its website, and transmits a memo to all Chief Human Capitol Officers (CHCO) announcing that the ALJ examination will open in the near future. In addition, the CHCO memo is sent to all Chief ALJs/Designees, ALJ Associations, National Bar Associations, women and minority bar associations, and various veterans' organizations. Applicants on expiring registers are also notified of the need to reapply if they want to continue to be considered.

The qualifications for the position are detailed in the Job Opportunity Announcement and in the *Qualification Standard for Administrative Law Judge Positions.* The Qualification Standards and other information for potential applicants are readily accessible on our ALJ Web page, https://www.opm.gov/services-for-agencies/administrative-law-judges. This Web page includes information for 10-point preference eligible veterans on how to apply for a quarterly examination at any time, which is their right under the Veterans' Preference Act.

OPM also reviewed materials that SSA provided on its website to share information about the ALJ process, examination, and becoming a SSA ALJ. SSA developed materials and videos to promote the job announcement.

2. Ms. Gruber's testimony indicated that in 2016 SSA only received 260 unique names for 81 locations. While we understand that there are other Federal agencies that use ALJs, at the end of FY 2015 they employed only 17% of all Federal agencies.

Q: After approximately 250 ALJs are allocated to SSA and potentially 100 are allocated to other agencies, what happens with the approximately 275 other ALJs?

OPM: The register is a list of candidates for an ALJ position, not current ALJs. Candidates cannot become ALJs until and unless they have been selected, been adjudicated suitable for Federal employment, and been appointed to the position by an agency appointing official.

In addition, OPM does not allocate candidates to specific agencies. Applicants who receive a final numerical rating are placed on the ALJ register. The ALJ register is a list of candidates eligible for selection and used to make referrals (certificates) to agencies for employment consideration when they have entry-level ALJ vacancies to fill. When an agency requests a certificate for a particular location, the names of candidates who indicated they were willing to be considered for that location are drawn from the top of the register and added to a certificate, in descending rank order. Candidates can be concurrently referred on more than one certificate at a time to different agencies and locations if their names are within reach for certification at each location. Candidates who have not yet been referred or who have been referred but not selected yet remain on the register until either they have been selected or OPM creates a new register (when a new examination instrument is created and administered).

On March 7, 2016, SSA requested certificates to fill approximately 120 vacancies at 81 locations, which OPM provided. On each of those 81 certificates, OPM sought to provide adequate names to fill the vacancy or vacancies at that location. This number of candidates was provided in light of the fact that top-ranked candidates have the right to be considered ahead of other candidates in as many locations as they are willing to work, which means that many of the candidates *across* certificates are the same people. Also, OPM sought to account for other contingencies, such as declinations.

We aimed to provide SSA with enough names per location to allow it to appropriately apply the statutory rule of three (and veterans' preference), as it selected for each vacancy, without running out of names, at least at most locations. As it turned out, there were about 264 unique names on the 81 certificates. Because the two candidates in the top three not selected for a particular vacancy at a particular location roll over and become two of the top three for the next selection,

we believe 264 names are a sufficient number of candidates for 120 vacancies. But we also understood that SSA was concerned about having enough names to fill all the positions, and informed them that additional names were available for any location where SSA could demonstrate that the certificate was running low on candidates.

Q: Are there roughly 275 ALJ candidates that OPM considers eligible but SSA does not? Is that figure consistent with past hiring cycles?

OPM: Every ALJ candidate on the register has passed the ALJ examination. By law (5 U.S.C. 3313), all of these candidates are fully "qualified" and "eligible" to work as ALJs.

Q: Has SSA made its criteria available to OPM so that OPM can better recruit the type of candidates SSA deems to meet its own standards?

OPM: The ALJ position is a unitary position. An ALJ at one agency may be transferred or loaned to another agency precisely because the qualifications for the position are the same across agencies. The ALJ examination, which was developed through significant participation from SSA subject matter experts (sitting ALJs) is designed to meet the needs of all ALJ-employing agencies. However, OPM has periodically informed SSA, most recently in 2015 and 2016, that if SSA can empirically support the need for additional testing criteria specifically related to high-volume case processing through an occupational analysis, OPM would consider a selective factor to screen applicants based on such criteria. In all competitive exams, including the ALJ exam, assessment elements or selective factors have to be professionally developed, supported by a job analysis, job-related and based on business necessity.

3. OPM has purportedly changed its criteria for ALJ selection in the recent past to value litigation experience over administrative law experience. As SSA hearings are investigatory and not adversarial, this may be a source of SSA's dissatisfaction with the candidates on the register that it declines to hire.

Q: Judging by the candidates that SSA interviews and later declines to hire, what appears to be the disconnect between the criteria by which OPM considers ALJ candidates qualified, and SSA does not?

OPM: OPM conducted an occupational analysis in 2012/2013 in which the subject matter experts (sitting ALJs, many of whom were from SSA) determined what qualities were important in an ALJ. This analysis concluded that both litigation and administrative law experience can be qualifying for ALJ applicants. As required by 5 U.S.C. 3313, all of the candidates on the ALJ register have qualified in a competitive examination and been rated eligible.

Q: Do you have this issue with other agencies that use ALJs?

OPM has received no information to suggest that is the case.

Q: What percent of their ALJs do the other agencies hire directly from the register? What percent do they hire away from SSA?

Selections from ALJ Register by Non-SSA Agencies
FY 2014 -2016

Fiscal Year	Number of Selections
2014	**8**
2015	**3**
2016 (as of June 6, 2016)	**10**
Total	**21**

The number of transfers per year from SSA to other agencies is on average 14 per year.

Transfers from SSA to Other agencies
FY 2010 -2016

Fiscal Year	Number of Transfers
2010	**15**
2011	**15**
2012	**17**
2013	**17**
2014	**11**
2015	**12**
2016 (as of June 6, 2016)	**10**
Total	**97**

Q: Has OPM considered reworking ALJ criteria to help a greater number of approved ALJs on the register to meet SSA standards?

OPM: SSA ALJs, including chief ALJs, were closely involved in the occupational analysis upon which the ALJ examination is based. We note that the use of agency specific selective factors is not currently supported for the position of ALJ, which Congress created as a government-wide position. However, OPM has suggested to SSA that it can submit an occupational analysis, supported by empirical data, if SSA believes that it needs selective certification of candidates to meet any agency-specific needs.

Q: Could this be accomplished without a several-year period of notice and comment suspending the refreshing of the register?

OPM: There is no need for notice and comment or a suspension of the refreshing of the register in order for OPM to consider redesigning the ALJ examination. OPM periodically undertakes a redesign of the examination, while still issuing certificates from an existing register, in order to take advantage of new knowledge, techniques, and technology, and avoid overuse of an existing instrument, which makes the existing instrument less predictive of success in the position.

The 2013 and 2016 ALJ examinations are based on the same occupational analysis. Therefore, applicants from these examinations, as well as the quarterly exams, can be placed on the same ALJ register. If SSA conducts an occupational analysis that demonstrates the need for a selective factor, then OPM can incorporate that change into a future iteration of the ALJ examination.

4. It is OPM's joint responsibility along with the agency employing the hearing officer to ensure that hearings described as de novo under the Administrative Procedure Act (APA) are heard before an ALJ.

Q: How do you determine when to use an ALJ and when a non-APA hearing officer is acceptable for a new position created by an agency?

OPM: OPM's responsibility in this area relates to issuing regulations, ensuring that the position descriptions for the ALJs do not include conditions that interfere with the qualified independence of ALJs, and determining that reassignments are made in an appropriate manner. Specifically, to protect the qualified independence of ALJs, Congress has provided in 5 U.S.C. 3105 that ALJs "may not perform duties inconsistent with their duties and responsibilities as administrative law judges." OPM's regulations therefore restrict the length of time that an ALJ can be internally assigned to non-ALJ duties and require the assignment to be consistent with ALJ duties and responsibilities. (5 CFR 930.201(e), 930.207(c)) OPM's regulations permit the interagency detail of an ALJ only to another ALJ position. (5 CFR 930.201(e), 930.208). The regulations also prohibit the detail of a non-ALJ to an ALJ position. (5 CFR 930.201(b)). These provisions, however, do not preclude an agency from assigning a hearing officer other than an ALJ from conducting proceedings where the agency's governing statute does not require the hearing to be conducted by an ALJ.

Agencies are responsible for ensuring that they follow their originating statutes or other authorities that determine under what circumstance the public is entitled to a hearing before an

ALJ. For example, some agencies operate under a statutory requirement to conduct a proceeding under 5 U.S.C. 556 and 557. Other statutes require or expressly permit other classes of adjudicators to conduct proceedings, or leave a gap for agencies to fill through rulemaking.

Q: Your testimony reflects that OPM had no involvement in SSA's March 2016 change to its Administrative Appeals Judge position description to include holding de novo hearings and significant travel. Isn't it OPM's responsibility to weigh in on such changes to ensure that APA hearings continue to be held by ALJs as required by the APA?

OPM: As noted above, the question of whether an agency is required to use an ALJ or permitted to use an adjudicator other than an ALJ for a particular matter is normally resolved by the agency's originating statute or some other authority, not the APA itself. Administrative Appeal Judges are not the same as ALJs. As an exercise of its regulatory authority over the ALJ program, OPM reviews agencies' ALJ position descriptions and the vacancy announcements that agencies use to hire incumbent ALJs. Agencies do not need to consult with OPM when making a change to position descriptions for non-ALJ positions, however.

Q: There are over 3,000 non-APA adjudicators throughout the Federal Government; has OPM ever undertaken a survey of the usage of ALJs vs non-APA hearing officers government-wide with a view towards ensuring conformity with the APA?

OPM: No. We are not charged with surveying the universe of adjudicative, rulemaking, and licensing programs in the Executive branch, which are governed by a myriad of agency-specific authorizing statutes and regulations.

As we previously noted, some agencies operate under a statutory requirement to conduct a proceeding before an ALJ under 5 U.S.C. 556 and 557. Other statutes require or expressly permit other classes of adjudicators to conduct proceedings, or leave a gap for agencies to fill through rulemaking. An agency's decision to "designate[] under statute" a class of proceedings to be heard by non-ALJ hearing officers may be a policy judgment of how to fill a gap in an ambiguous statute. It would be inappropriate for OPM to sit in review of the propriety of such policy judgments.

SOCIAL SECURITY

Office of Disability Adjudication and Review

August 4, 2016

The Honorable James Lankford
Chairman, Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Thank you for the opportunity to appear before you and for your May 31, 2016 email requesting additional information to complete the record for the May 12, 2016 hearing on ODAR's Adjudication and Augmentation Strategy (AAS).

Please be aware that in light of our current budget situation, we do not now have the resources to implement the AAS as originally envisioned.

I hope that the information we are providing in response to your post-hearing Questions for the Record and my oral and written statements provide a fuller perspective of our long standing legal authority that underlies our AAS and the compelling need to explore every option to address our service crisis.

I hope this information is helpful. If I may be of further assistance, please feel free to contact me. Your staff may contact Ms. Judy Chesser, our Deputy Commissioner for Legislation and Congressional Affairs, at (202) 358-6030.

Sincerely,

Theresa Gruber
Deputy Commissioner
for Disability Adjudication and Review

Enclosure

Post-Hearing Questions for the Record
Submitted to Theresa L. Gruber
Deputy Commissioner, Disability Adjudication and Review
U.S. Social Security Administration
From Chairman James Lankford

"Examining Due Process in Administrative Hearings"
May 12, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1. At the hearing, testimony was received that indicated at least as of recent years, SSA had enough funding to hire ALJs. The record also reflects that there were 600 ALJ candidates on the latest register. At the end of FY 15, 83% of all Federal ALJs were employed by SSA. Assuming that other agencies would need approximately 100 of the ALJs on the register, and SSA hires 225 this year, 275 available ALJ candidates remain.

Q: When SSA contends that there aren't enough qualified ALJ candidates and must instead augment them with AAJs, is the reality that SSA cannot find 65 ALJs out of the approximately 275 candidates left on the register? If so, are all of these 275 remaining ALJs not up to SSA's standards?

We are not stating that all of the remaining candidates will not meet our standards. Experience shows, however, that we can end up with no candidates for certain locales such that we cannot fill our need. To clarify why this is not a simple mathematical issue, let me discuss the mechanics of the process.

The current process requires the Social Security Administration (SSA), like other hiring agencies, to periodically request certificates of potential candidates, by geographic location — there must be a match between where we are hiring and where a candidate is willing to work. We are only provided a portion of possible candidates at any given time and we do not know how many total candidates are available nor do we receive a list of all available candidates. SSA and the other hiring agencies are not informed of the total number of potential candidates who currently may be on the list. For example, in March 2016 we requested certificates for 81 geographic locations from the Office of Personnel Management (OPM). In response, we received 81 certificates, with up to 75 names per location; however, these were not 75 unique candidates, because candidates may apply for multiple locations. This results in duplicate names appearing on multiple lists. After we eliminated duplicate applicants from the total of 5,894 names on the 81 certificates, we had only 264 unique individuals to consider. This number was reduced further to 221 names because we did not select 43 of these candidates three times previously. In effect, those 5,800 names—or any other total number of names provided to us on multiple certificates—are misleading in terms of the actual number of discrete eligible candidates for each location. When we work through a list of names and do not have enough candidates to complete our hiring effort in particular locations, we make a new request to OPM for more names. For example, we requested additional names for 19 of the 81 locations for which we

requested certifications in early March but did not have enough unique names to meet our hiring goals.

Before we make an offer to a candidate, we take several important steps to ensure we are making an informed hiring decision. Applicants report their license status long before they are placed on the administrative law judge (ALJ) register for selection by agencies. OPM does check license status at the beginning of the examination and immediately before applicants are placed on the register. Nevertheless, some applicants will change their bar license status after they are placed on the register, so we check bar license status again. We conduct a preliminary suitability screening on key areas including education, state and national bar affiliations, credit, motor vehicle record, criminal record, and references. We also require a personal interview to assess the skills necessary for our high volume, non-adversarial process.

The additional steps we take ensure we fill important gaps that may not be readily transparent. Our work environment is high-production, and candidates must be able to work in a non-adversarial setting, often with vulnerable claimants. In addition, successful candidates must be able to proficiently use technology and review significant volumes of medical evidence.

This process is time consuming and costly, but we have learned through experience that it is worth the investment to protect vulnerable claimants who appear before ALJs. In addition, the timeframes and cost to terminate ALJs who have significant conduct issues, do not follow agency policy, or cannot process cases timely is extraordinary.

Our goal is to hire 225 to 250 ALJs this fiscal year (FY). As of June 26, we have hired 151 ALJs, including 148 new ALJs and 3 ALJ transfers from other agencies. However, erratic and untimely funding complicates this "fits and starts" process. Running a large agency without the benefit of a timely and predictable budget year after year makes it difficult to efficiently plan. Adding to that challenge, new workloads and rules may arise, which add additional complexity to our programs and business processes. We can develop and use new tools like data analytics and clarify regulations to help—but those new tools require time and resources.

We genuinely appreciate your interest in understanding our programs and challenges and willingness to hold hearings on key public policy and service issues.

Q: If OPM's and SSA's standards for a "qualified" candidate are markedly divergent, considering that SSA is the most significant user of ALJs, what is SSA doing to ensure that OPM provides candidates that SSA would deem qualified in the future?

OPM provides eligible candidates to all Federal agencies employing ALJs, not just our agency. As discussed in response to the prior question, the nature of our high-volume, non-adversarial hearing process demands that we take additional steps to ensure that we are selecting candidates who are a fit in terms of generally-applicable qualifications like a current bar license; public trust suitability (including whether criminal and financial history is consistent with the integrity and efficiency of the service, job requirements, and business necessity); and a skillset that supports working well with others and the public in a production environment that requires analytical thinking, decision making, and comfort with medical terminology and its application to work.

We continue to work closely with OPM to balance its process with our needs. Per the President's FY 2016 budget, the Administration created a workgroup led by the Administrative Conference of the United States and OPM, along with SSA, DOJ, and the Office of Management and Budget (OMB) to review the process of hiring ALJs and recommend ways to eliminate roadblocks. In addition, Chief ALJ Debra Bice and other management ALJs have personally participated in many meetings at OPM serving as subject matter experts and providing feedback on the ALJ examination. Currently, we meet with OPM on a bi-weekly basis to discuss the ALJ hiring process, and plan to meet with them later this month to explore additional initiatives to both streamline and improve our collaboration in hiring ALJs for SSA.

2. Aside from the 1.1 million backlogged cases at the ALJ level, the Appeals Council currently has its own significant backlog and prolonged processing times.

Q: As the ALJ corps produces more decisions by working down their backlog, doesn't the agency need to hire more AAJs to do the increased Appeals Council work downstream?

The Appeals Council (AC) does not have a growing backlog. Its workload continues to decrease by approximately 1,000 cases per month, down to below 140,000 (and down from a historic high of approximately 162,000 cases in FY 2012). We considered the impact on the AC in developing our proposals, and folded expected additional requests into the staffing projections for the adjudication augmentation strategy (AAS).

Q: If the Appeals Council can't handle its own caseload, shouldn't new AAJ hires be deployed to reduce this backlog before repurposing them to tackle other workloads?

As noted in the previous response, the AC does not have a growing backlog, and its workload is down to below 140,000. The AC has implemented a number of practices from award-winning training to productivity standards to the use of data analytics and technologies like natural language processing and clustering to maintain a reasonable workload even in the face of budget cuts and increasing receipts.

3. ALJs and AAJs pay scales are the same. However, the AAJ position description was updated in March 2016 to include a new requirement for "significant travel."

Q: Approximately 30% of claimants refuse Video Teleconference hearings; how can the additional costs of AAJs traveling to locations to hold the hearing – and performance bonuses AAJs can receive that ALJs cannot – be an efficient use of resources?

Our ALJs already travel for some hearings where claimants decline video hearings; thus, our decision to have administrative appeals judges (AAJs) hold hearings will, to a large extent, result in a shift of expected travel costs. While AAJs can receive performance awards, these awards have not been significant relative to the AAJs' overall salary. For example, last fiscal year the Appeals Council's AAJs received a total of $75,000 in awards, or about $1,200 per AAJ. This year, in light of budget constraints, we will not issue awards this fiscal year.

The AAS calls for AAJs to hold video hearings in all cases where it is not refused. When AAJ travel is necessary, data analytics will be used to select cases to reduce travel. Moreover, the AC has business process efficiencies, including how cases are prepared for AAJ review, which will allow us to realize additional savings.

Hiring enough qualified ALJs in a timely manner remains our best strategy to reduce the workload pending at the hearing level. This strategy comes with its own set of upfront costs as OPM has charged us $6.6 million this year for its ALJ hiring services, which included the increased cost of expanding the pool of applicants who were permitted to go through the examination in order to provide additional candidates for the ALJ register. However, while we try to accomplish this goal, we need to do what we reasonably can to reduce wait times. We were deliberate in our approach to how the AC could help. We intentionally identified two workloads: non-disability appeals currently pending in hearing offices and disability cases already before the AC on appeal.

Non-disability cases account for approximately 10,000 cases pending at the hearing level each year. Due to the small number of cases spread throughout the nation, ALJs may only receive a few, if any, non-disability cases each year; the AC currently takes corrective action in 36 to 48 percent of these cases in a given fiscal year. The AC already centralizes non-disability cases, providing specialized training and developing expertise that most ALJs do not have the opportunity to build. We expect the AC's expertise to result in more policy- compliant decisions.

The disability cases we included in the AAS are cases already before the AC on appeal—the claimant has already had a hearing before an ALJ and we are asking the AAJs to take additional actions rather than return the case to the hearing level. AAS simply extends the cases the AC can complete by having it take certain development actions and hold hearings.

4. As AAJs begin to perform a significant number of hearings, there are bound to be questions and comparisons of their quality and productivity compared to ALJs.

Q: Would the proposed AAJ hearing decisions be subject to quality review?

Yes, cases heard by AAJs would be subject to the same quality review as ALJ decisions.

Q: How would you mitigate concerns with the quality review of an AAJ being performed by another AAJ from the same office?

Our focus is on the policy compliance of decisions to ensure that individuals who qualify for benefits receive them, and that those claimants who do not qualify do not receive benefits. Reviewing work of another adjudicator, including another AC adjudicator, is a normal part of the AC business process. The AC's remand process requires more than one adjudicator to review the case before it is remanded. The fact that it acts as a Council supports its engrained culture of arriving at a fair and policy compliant decision. In addition, AAJs in the Division of Civil Actions routinely review actions by other AAJs to determine whether request for voluntary remand from Federal court is appropriate and AAJs in the Division of Quality routinely review

actions by other AAJs to identify areas of policy noncompliance and opportunities for feedback on quality.

AAJs already currently decide cases as the final level of administrative review and review the work of ALJs through the appeals and quality review processes. There is no reason why taking on AAS work would change the AC's already robust and interactive case review process.

Q: What productivity does Social Security expect from these new AAJs, especially considering the significant amount of travel required of them?

The AC is an experienced component that has a division that specializes in non-disability work. The disability work is an extension of actions on cases already pending before the AC on appeal—the AC as part of its non-AAS function has already invested significant time on these cases and under AAS would take additional actions, which is more efficient than returning them to an ALJ for completion. As mentioned above, we believe travel will be minimal, and where an AAJ does need to travel, we will minimize travel dockets through geographic clustering. We are confident that AAJs will hold at least as many hearings as ALJs would handling the same docket of cases.

5. Non-disability claimants who have their hearing by an AAJ will lose the 4th step of the Appeals Process. Appealing to the Federal Court level is a daunting undertaking for anyone, least of all claimants who are unlikely to have access to attorney representation due to the lack of financial incentive.

Q: When some claimants have the opportunity to appeal to the Appeals Council and others do not, how do you address the natural equal protection and due process concerns?

Due to the small total number of cases spread throughout the nation, ALJs may only receive a few, if any, non-disability cases each year; the AC currently takes corrective action in 36 to 48 percent of these cases. The AC already centralizes non-disability cases, providing specialized training and developing expertise that most ALJs do not have the opportunity to build. We expect the AC's expertise to result in improved policy compliance.

Our claimants will continue to receive a hearing by a judge. AAJs are licensed attorneys recognized by Congress as judges under 5 U.S.C. § 5372b. AAJs will hold hearings and apply due process requirements for adjudication under the Social Security Act (42 U.S.C. §§ 405 and 1383), which the Supreme Court has recognized are consistent with those required by the Administrative Procedure Act (APA) (5 U.S.C. §§ 556(d) and (e)). In addition, AAJs will hold hearings and apply due process under the requirements set forth in agency statutory (42 U.S.C. §§ 405 and 1383) and regulatory guidance (20 C.F.R. § 404.956), as well as sub-regulatory guidance written by AAJs at the AC (Hearings Appeals and Litigation Law (HALLEX) manual chapters I-2-3 through I-2-9). Our process will still provide that: any material evidence may be received; a party is entitled to present his or her case by oral or documentary evidence and conduct cross-examination; the record will be made available to all parties; and, where an agency decision rests on official notice of a material fact, a party is entitled the opportunity to show the contrary. In addition to these guidelines, HALLEX also prescribes further requirements,

including, but not limited to: the proper form and timelines required in giving notice of the time, place and issues to be considered at a hearing; access to interpreters and other assistive resources; specific requirements for when the adjudicator must develop the record or obtain testimony; explanations of the hearing and decisional process; notification of the right to representation and postponement of the hearing to obtain representation; and, proffer of post-hearing evidence and the offer of a supplemental hearing.

We are still developing our final business process, and we would be happy to discuss options to address further any concerns about administrative review.

SOCIAL SECURITY

Office of Disability Adjudication and Review

August 4, 2016

The Honorable Heidi Heitkamp
Ranking Member, Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Senator Heitkamp:

Thank you for the opportunity to appear before you and for your May 31, 2016 email requesting additional information to complete the record for the May 12, 2016 hearing on ODAR's Adjudication and Augmentation Strategy (AAS).

Please be aware that in light of our current budget situation, we do not now have the resources to implement the AAS as originally envisioned.

I hope that the information we are providing in response to your post-hearing Questions for the Record and my oral and written statements provide a fuller perspective of our long standing legal authority that underlies our AAS and the compelling need to explore every option to address our service crisis.

I hope this information is helpful. If I may be of further assistance, please feel free to contact me. Your staff may contact Ms. Judy Chesser, our Deputy Commissioner for Legislation and Congressional Affairs, at (202) 358-6030.

Sincerely,

Theresa Gruber
Deputy Commissioner
for Disability Adjudication and Review

Enclosure

Post-Hearing Questions for the Record
Submitted to Theresa L. Gruber
Deputy Commissioner, Disability Adjudication and Review
U.S. Social Security Administration
From Senator Heidi Heitkamp

"Examining Due Process in Administrative Hearings"
May 12, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1. **One of the key issues highlighted at the hearing was SSA's continuing efforts to reduce both the hearing backlog and average wait time for decisions. However, SSA explained at the hearing that the adjudication augmentation strategy contained in the CARES Plan will only go so far in alleviating those challenges.**

   - **How exactly will ALJ workloads be alleviated by shifting non-disability cases to the Appeals Council? Can any such increase in decisional capacity be precisely quantified?**

   The Appeals Council's long-standing role is to handle the agency's final administrative appeal, reviewing approximately 160,000 ALJ decisions each year, including non-disability issues.

   While we strive to hire enough qualified ALJs, we need to consider what more we can do to help the more than one million people waiting for a decision. We were deliberate and refined in our approach to how the Appeals Council (AC) could help reduce the number of pending hearings. We intentionally identified two workloads: non-disability appeals currently pending in hearing offices, and disability cases already before the AC on appeal.

   We chose the non-disability workload because the AC already centralizes this type of work, and has developed expertise in this area. There are very few of these cases, and ALJs rarely see enough non-disability work to become experts. During the last 5 years, the AC has taken corrective action on between 36 and 48 percent of the appealed non-disability cases currently adjudicated by ALJs. Often this corrective action is in the form of a remand order, requiring an ALJ to handle the case a second time, adding to the backlog and wait times. It also adds to the wait time for each claimant whose case was next in line to be handled by the ALJ and who must now wait longer while the ALJ handles the original case a second time.

   We identified approximately 10,000 non-disability cases per year that the AC could handle, which directly reduces the hearing level's pending workload by that number, helping those claimants get accurate decisions more quickly and freeing ALJs to focus on disability cases. In addition, shifting these cases with high rates of corrective action will also reduce the pending workload by reducing the number of cases remanded to the ALJs. In selecting non-

disability cases, our reasoning is that we can help claimants receive an accurate decision in a timely manner.

- **Did the agency evaluate the costs of various alternatives? If so, is the cost of this proposal greater or less than providing ALJs additional administrative and clerical support?**

The Adjudication Augmentation Strategy (AAS) is only one of several components to our CARES plan, as we have taken a multi-faceted approach to reducing our hearing level's pending workload. We are exploring all alternatives from a resource, business process, automation, and structural standpoint. That said, hiring enough qualified ALJs in a timely manner remains our best strategy to reduce the hearing level's pending workload. In addition, extra support staff is necessary to support the ALJs we hire, although hiring additional support staff alone would not reduce the high wait times and pending requests that stem from logjams in holding hearings and making decisions. We need decision makers, such as ALJs and AAJs.

- **Does SSA have any empirical basis or evidence demonstrating that an attorney examiner (AE) will issue an equally valid decision more quickly or efficiently than an ALJ would?**

Our Adjudication Augmentation Strategy does not favor ALJs over AAJs or AAJs over ALJs. It is simply a strategy to help claimants.

It is important to focus on the substance and skills of the Administrative Appeals Judge function rather than on a title—using the functional title of *Attorney Examiner* or the official organizational title of *Administrative Appeals Judge*, as they have long been referred to, does not change the underlying qualifications. AAJs handle the final level of administrative appeal for the agency, after a case has already been decided by an ALJ. This is not a new position created as part of the Compassionate and Responsive Service (CARES) plan. Appeals Council AAJs are licensed attorneys recognized by Congress as judges, under 5 U.S.C. § 5372b.

The authority to hold hearings rests with the Commissioner, who lawfully delegated this authority to the AC pursuant to section 205(l) of the Social Security Act when the AC was established in 1940, and has continued to do so through subsequent delegations of authority. The AC members, along with the "referees" – ALJs, in the classification vernacular of the time – were delegated "all necessary and appropriate powers to hold hearings and render decisions in accordance with such regulations as the Board shall adopt." The Administrative Procedure Act (APA), enacted six years later, in 1946, specifically does not remove any prior delegations of authority, including the AC's delegated authority to hold hearings. PL 79-404, 60 Stat. 237 (1946) ("Nothing in this Act shall be construed to repeal delegations of authority as provided by law."). Nor is this authority a recent phenomenon. In an analysis of the Social Security System in 1953 and 1954, the Subcommittee on Social Security of the House Committee on Ways and Means included a memorandum from the Chief of the American Law Division of the Legislative Reference Service of the Library of Congress. The

memorandum stated that while the referee for any hearing shall be appointed by the Chairman of the Appeals Council, the Chairman also "may designate as referee a member of the Appeals Council." In 1959, Congress further investigated this issue and received an opinion from the law firm of Covington & Burling stating that essentially the Appeals Council retains full authority to hold hearings, and ALJs may be used when the Appeals Council does not have the time or resources to hold hearings. The authority of the Appeals Council to hold hearings has also been historically memorialized throughout regulations (20 CFR 403.709(d) (1938-1943 Cum. Supp.); 20 CFR 403.710(b), (c) (1944); 20 CFR 403.709(m), 403.710(d) (1947); 20 CFR 404.941, 404.943, 404.950 (1961); 20 CFR 404.941, 404.948(c), 404.949 (1976); 20 CFR 404.956, 404.976(b), (c) (1981)).

As members of the AC, AAJs review ALJ work and may take corrective action. Corrective action may include AAJs issuing the final agency decision on a claim under 20 CFR 404.979 and 416.1479; in fact, the AC already issues approximately 3,000 final decisions each year. To date neither the Federal courts nor Congress have ever questioned the ability of the AC to issue decisions.

As mentioned above, non-disability cases account for approximately 10,000 cases pending at the hearing level each year. Due to the small number of cases spread throughout the nation, ALJs may only receive a few, if any, non-disability cases each year; over the past five years, the AC took corrective action in 36 to 48 percent of these cases each year. The AC already centralizes non-disability cases, providing specialized training and developing expertise that most ALJs do not have the opportunity to build. We expect that the AC's expertise will further reduce the overall workloads of both AAJs and ALJs.

Since its inception in 1940, the AC has served as the final safeguard of review and assurance of due process for all cases adjudicated under the Social Security Administration's programs. With respect to timely decisions, the AC manages its resources effectively, therefore keeping its pending workload manageable, while also handling the oldest cases. The AC is committed to ensuring policy compliance so that claimants receive fair and accurate decisions. The AC established a Division of Quality to perform quality reviews that not only address issues in individual cases, but also identify areas of global policy compliance issues as well as fraud. The AC uses data analytics to look for trends affecting due process and policy compliance that otherwise may be overlooked. We welcome the opportunity to brief you on the quality review process and share examples of our findings, which we are confident will increase your level of security with the AC's emphasis on rendering a legally sufficient decision. Every day, AAJs handle the agency's final administrative appeal actions, with subsequent review only through the federal courts.

In summary, the AC's AAJs have developed specialized experience in non-disability case work and their role in the appeals process and quality review work emphasizes and reinforces policy compliant decisions. These qualities promote efficiency and accurate decisionmaking. Taking action on a case that would otherwise be remanded back to an ALJ to handle a second time also promotes administrative efficiency and more timely service to claimants.

- **If this adjudication augmentation strategy proves successful, would SSA consider transferring any other types of cases away from ALJs to AEs? How would SSA determine what other sort of cases would be transferred to AEs?**

We have no plans to refer additional cases to the AC. We prudently selected non-disability cases for the reasons discussed above. The disability cases we included in the AAS are cases already before the AC on appeal—the claimant has already had a hearing before an ALJ, and we are asking the AAJs to take additional actions rather than return the case to the hearing level. We want to stress again that the only objective for this plan is to help people who deserve timely decisions from our agency. The goal of the augmentation strategy and other CARES initiatives is to reduce wait times to an acceptable level of 270 days and eliminate the backlog of cases. In addition, the CARES plan envisions that SSA will have more ALJs than ever before, provided we have adequate funding and the necessary candidates.

2. **It appears that the business process, information technology, and facility components of the CARES initiative hold promise to help achieve the stated goals.**

- **Does SSA have sufficient resources to implement the IT and business process improvements set forth in the CARES initiative in a full and timely manner? What internal control and accountability mechanisms are in place to assure their proper execution?**

Adequate and sustained funding is necessary to pursue and implement the initiatives in our plan. Only if the agency is provided enough funding to fully fund the CARES plan, will we be able to implement it in a timely manner and properly.

3. **Lost in the debate over the proposed transfer of non-disability cases from ALJs to AEs on the Appeals Council is the role that other SSA employee groups and unions play in managing the efficient workflow of appeal and hearing requests.**

- **What is SSA's strategy to successfully meet any other human resource management challenges related to the training, efficiency and morale of non-ALJ, non-AAJ/AE, non-AC administrative and clerical support personnel that could be impacted by this proposal?**

As Deputy Commissioner for the Office of Disability Adjudication and Review, I have implemented several programs designed to provide development opportunities and improve employee morale. For example, our Compass program is designed to enhance career and leadership development. I implemented leadership training to ensure managers have the opportunity to raise concerns and participate in finding solutions. We work diligently with the labor unions, including participating in labor management forums on a monthly basis. An important aspect of the CARES plan is the implementation of our communications plan. Our communications plan actively engages all staff via conference calls, emails, video on demand, personal visits, as well as a website dedicated to the CARES plan. In addition, we are continuing to expand two-way communication and recently developed and implemented an online portal for employee suggestions.

4. **I remain concerned about the due process rights of claimants involved in non-disability cases being transferred to the Appeals Council. It certainly appears from an individual citizen's perspective that a claimant loses an existing appeal right under this proposal whereby cases are being referred directly to the Appeals Council.**

   - **Please explain in layman's terms exactly how this change will affect an individual seeking a non-disability appeal.**

   We are still developing our final business process, and we would be happy to discuss options to address further any concerns about administrative review.

   - **How does this plan not unfairly disadvantage or penalize claimants simply for a small net gain in efficiency?**

   Our claimants will continue to receive a hearing by a judge. Appeals Council AAJs are licensed attorneys recognized by Congress as judges under 5 U.S.C. § 5372b. AAJs will hold hearings and apply due process requirements for adjudication under the Social Security Act (42 U.S.C. §§ 405 and 1383), which the Supreme Court has recognized are consistent with those required by the APA (5 U.S.C. §§ 556(d) and (e)). In addition, AAJs will hold hearings and apply due process under the requirements set forth in agency statutory (42 U.S.C. §§ 405 and 1383), and regulatory guidance (20 C.F.R. § 404.956), as well as sub-regulatory guidance written by AAJs at the AC (Hearings Appeals and Litigation Law (HALLEX) manual chapters I-2-3 through I-2-9).

   Our process will still include all of the following protections: any material evidence may be received; a party is entitled to present his or her case by oral or documentary evidence and conduct cross-examination; the record will be made available to all parties; and, where an agency decision rests on official notice of a material fact, a party is entitled to the opportunity to show the contrary.

   In addition to these guidelines, HALLEX also prescribes further requirements, including, but not limited to: the proper form and timelines required in giving notice of the time, place, and issues to be considered at a hearing; access to interpreters and other assistive resources; specific requirements for when adjudicators must develop the record or obtain testimony; explanations of the hearing and decisional process; notification of the right to representation and postponement of the hearing to obtain representation; and, proffer of post-hearing evidence and the offer of a supplemental hearing.

5. **While the subject was to be covered during the hearing, we did not devote much time to discussing Adjudication Process Reform.**

   - **What is the most important reform that can be undertaken today without an Act of Congress? What assistance do you need from Congress to improve adjudication?**

The most important reform we can undertake is to implement the CARES plan, which will help people who deserve timely decisions from our agency. Congress can help us by ensuring we receive the adequate and sustained funding necessary to pursue and implement the initiatives in our plan.

We genuinely appreciate your interest in understanding our programs and challenges and willingness to hold hearings on key public policy and service issues.

6. **It appears the unprecedented percentage of denied claims by ALJs has contributed to the growing Appeals Council backlog. It seems to me that transparency is needed to allow for evaluation of the backlog, the rising number of cases before the Appeals Council, and the time spent by claimants enduring this additional stage in the adjudication process.**

- **What is the rationale behind the Agency's present Appeals Council disclosure policy? How does the data compare to what has been released previously by SSA?**

The AC does not have a growing backlog. Its workload continues to decrease by approximately 1,000 cases per month, down to below 140,000.

We are not clear on what the reference to the AC disclosure means, as the AC does not have its own separate disclosure policy; the information in the hearing process is subject to the same disclosure rules as other parts of the agency. The Appeals Council has met frequently with Congress and the Government Accountability Office (GAO) to share data and information. GAO is currently conducting a number of audits and reports using data prepared by and shared from the AC. The AC has routinely made its leaders and judges available for questioning in numerous public forums.

- **What would need to occur for SSA to consider a change in the Appeals Council disclosure policy?**

The AC does not have a separate disclosure policy. Its information is subject to the same rules as other parts of the agency.