



STATEMENT OF JUDGE D. RANDALL FRYE

**SENATE COMMITTEE ON HOMELAND SECURITY,
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT
MANAGEMENT, THE FEDERAL WORKFORCE AND
THE DISTRICT OF COLUMBIA**

November 15, 2010

**SOCIAL SECURITY DISABILITY
BACKLOG**

**Senate Committee on Homeland Security,
Subcommittee on Oversight of Government
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**Statement of the Honorable D. Randall Frye, President,
Association of Administrative Law Judges**

November 15, 2010

Chairman Akaka, Ranking Member Voinovich and members of the Subcommittee;

Thank you for inviting me to testify at this hearing. My name is D. Randall Frye. I am an administrative law judge who has been hearing Social Security Disability cases in Charlotte, North Carolina for about 14 years. I have also served as administrative law judge for the National Labor Relations Board for 1 ½ years. I am currently President of the Association of Administrative Law Judges (AALJ). The AALJ is Judicial Council Number 1 of the International Federation of Professional and Technical Engineers, AFL-CIO-CLE. AALJ represents the approximately 1400 administrative law judges employed at the Social Security Administration (SSA) and the Department of Health and Human Services. One of the stated purposes of the AALJ is to promote and preserve due process hearings in compliance with the Administrative Procedure Act (APA) and the Social Security Act for those individuals who seek adjudication of program entitlement disputes within the SSA. It is the long standing position of the AALJ that ensuring full and fair due process *de nova* hearings brings justice to the American people. The AALJ represents most of the approximately 1600 administrative law judges in the entire Federal government.

The Association of Administrative Law Judges is most grateful for the oversight of the Social Security disability program provided by the Subcommittee, particularly during the recent past when provided resources were inadequate to address the mounting backlog of disability cases. We too find it most painful that the American people, who are in the disability hearing process, have been disadvantaged by long delays in the adjudication of their disability cases. Our testimony today will address the President's FY 2011 budget, the status of the backlog, the impact of the Commissioners' initiatives on the backlog, the impact of the backlog on the ability of judges to provide due process to the American people and related issues which affect judges.

THE ADMINISTRATIVE JUDICIARY

In 1946, the Congress enacted the Administrative Procedure Act (APA) to reform the administrative hearing process and procedures in the Federal government and to protect, *inter alia*, the American public by giving administrative law judges decisional independence. "Congress intended to make hearing examiners (now administrative law judges) 'a special class of semi-independent subordinate hearing officers' by vesting control of their compensation, promotion and tenure in the Civil Service Commission (now the Office of Personnel Management) to a much greater extent than in the case of other federal employees". [*Ramspeck v. Federal Trial Examiners Conference*, 345 US 931 (1953)]. The agencies employing them do not have the authority to withhold the powers vested in Federal administrative law judges by the APA.

Prior to the enactment of the APA the tenure and status of these hearing examiners were governed by the Classification Act of 1923, as amended. Under that Act, the classification of the hearing examiners was determined by ratings given to them by the Agency and their compensation and promotion depended upon their classification. This placed the hearing examiners in a dependent status with the Agency employing them. Many complaints were voiced against this system alleging that hearing examiners were "mere tools of the Agency" and thus subservient to Agency heads when they decided and issued decisions on issues involving Agency determinations appealed to them. With the adoption of the APA, Congress intended to correct these problems. As earlier noted, this rather significant reform was undertaken to protect the American public by giving administrative law judges decisional independence.

BUDGETARY RELIEF

The AALJ and its membership deeply appreciate the recent budgetary support from Congress. These increases have resulted in much-needed hiring to fill the many support staff vacancies and to appoint new administrative law judges. For this support we are sincerely grateful. The shortfalls in funding by past Administrations created Agency wide staffing shortages which played a significant and long term role in preventing administrative law judges from addressing the developing backlog. The additional resources provided by the Congress permitted the Agency to reduce the backlog and to issue 658,600 dispositions in 2009 and 737,616 dispositions in FY 2010. In FY 2009, 147 new administrative law judges were appointed and approximately 1000 support staff hired. In FY 2010, 228 new administrative law judges were appointed and 1300 additional support staff hired. In addition, to better serve the American people, the Agency opened or expanded 19 new hearing offices in FY 2010. As you know, two of those new offices are located in Akron and Toledo.

Without question, the Congress of this great nation saved the disability adjudication system by its recent increases in financial resources to SSA. In so doing, the American people have been better and timelier served.

CONTINUED SUPPORT IS NEEDED

Although we have made progress in reducing the backlog, additional resources are still needed. At the rate of reduction in FY 2010, without considering any increase in applications, it would still take over four years, to the first of CY 2015, to reduce the backlog to a level of under 400,000 cases, the number SSA says it needs to keep the processing pipeline filled. However, in our view, it does not appear that this level will be reachable as applications are actually continuing to rise, and thus moving the date of “zero backlog” farther back in time.

More judges and commensurate staff are needed. New applications for disability benefits have increased at the DDS level and will continue at a high level as long as we have high unemployment and until the last of the baby boomers reach retirement age. The current level of judges available, about 1400, is not, in our view, sufficient to significantly increase the rate of reduction of the backlog nor even enough to prevent the backlog from increasing.

Equally important, the current level of staff is still not adequate. The judges in some offices are not getting cases in sufficient numbers to fill their schedules. In some offices, the staff ration to judge is under 4. While the Agency goal is 4.5 staff for each judge, we believe the judge would be most productive with a ratio of 5 to 1. Additionally the quality of preparation of the cases by staff has suffered as a result of shortcuts permitted by management before Congress increased SSA's budget. Insufficient preparation increases the amount of time required for the judges to review the case and increases the amount of time required for the decision writer to draft the decision. The amount of time saved by staff is more than doubled in time wasted by the judge and the decision writer, both of whom are paid at higher levels. For every dollar saved, several are spent.

Finally, resources are badly needed to perform Continuing Disability Reviews (CDRs) to insure that those receiving benefits are still disabled. This effort has been reduced even though it has historically returned ten dollars for every dollar spent.¹ Similarly, the Agency estimates that every dollar spent on SSI redeterminations yields \$8 in programs savings. In our view, it is unwise to neglect these important program integrity areas.

As you know, the President’s FY 2011 budget request for Social Security is \$12.528 billion, which includes \$12.379 billion in administrative funding through the Limitation on Administrative Expenses (LAE) account. This budget increases SSA’s staffing by only 614 positions over FY 2010. To effectively and efficiently discharge our responsibilities under the Social Security Act, we respectfully submit that the President’s budget is inadequate. As you also know, the Commissioner of Social Security submitted an independent budget which proposed \$13.1 billion for the LAE account which would increase SSA’s staffing level by 3758 positions over FY 2010. We continue to support the Commissioner’s proposed funding for FY 2011. This level of funding, if so directed, could add at least 100 more administrative law judge positions and 500 support staff. This additional staffing is needed to address the increasing number of requests for hearing.

¹ Statement of the Hon. Patrick O’Carroll, Inspector General, SSA, before the Subcommittee on Social Security of the House Committee on Ways and Means, Sep 16 2008

RECORD ADJUDICATIONS BY JUDGES

The judges and support staff in ODAR have been increasing productivity per judge year after year. The productivity of the judges is a tribute to the continuing effort of the administrative law judge corps. As above noted, in FY 2009, we issued 658,600 dispositions, and in FY 2010, we issued 737,616 dispositions. However, we continue to disagree with the use of per judge dispositions to measure the performance of a particular hearing office. This disagreement is founded in the fact that administrative law judges, for the most part, do not and cannot control the number of monthly dispositions. Factors such as staffing ratios, availability of cases to schedule, complexity of the cases, quality and training of staff, whether claimants are represented, whether interpreters are required, whether expert witnesses are necessary and whether the bar is skilled and cooperative are beyond the control of the Judge. Thus, a more accurate measurement of performance would be to measure the work output of each work unit. In our view, measuring discrete units of work for all groups of employees in a hearing office would result in a more precise and accurate productivity picture for each hearing office.

OTHER AGENCY INITIATIVES HAVE BEEN SUCCESSFUL

The Commissioner's Quick Disability Determination (QDD) and Compassionate Allowances (CAL) initiatives have been quick successful and well received. Importantly, cases are identified at the earliest stage that is likely to result in allowances. Characteristics of certain cases are profiled and used to quickly identify claimants who are clearly disabled as a result of their illness or disease. Employing these programs has clearly inured to the benefit of the disability claimant and to the American people as they have had a positive impact on the backlog.

The expansion of the senior attorney program has also had a positive impact on the backlog. Under this program, profiled cases are screened to assess whether the case can be reversed without the need for a hearing before an administrative law judge. This was expanded in 2010 so that senior attorneys review profiled cases from heavily backlogged areas of the country. This latter approach was facilitated by have the ability to retrieve case information electronically.

Another initiative which the agency has introduced at the DDS level is the Automated Electronic Claims Analysis Tool (eCAT). This is a software program which requires DDS disability examiners to follow and apply Agency regulations and law to the facts of a given case. The Agency's assessment thus far has been positive. While this software may well prove to be helpful at the DDS level, we strongly oppose its application at the administrative law judge level. In this regard, the imposition of findings of fact and conclusions of law by using eCat would violate the APA and materially interview with the ability of the judge to provide due process and justice. The APA requires that we provide a *de nova* on the record hearing. Thus, it is the administrative law judge who must always make the initial findings of fact and conclusions of law based of their independent determinations as to the facts and the application of relevant law to those facts. DDS decisions, forced by computer software can never become the substitute for the "judgement" of the judge or the "decision" of the judge. To permit such a result would undermine a judge's decisional

independence and ultimately permit “agency heads” to decide important disability issues through carefully crafted software design. As earlier noted, this type of interference, although not envisioned by Congress at the time, is precisely the kind of intrusive conduct by agency officials that Congress prohibited when it enacted the APA.

AGENCY STEWARDSHIP

For the last decade, the AALJ has consistently advocated that the most effective way to address the rising backlog was by the appointment additional ALJs and staff. We commend the Commissioner for his wisdom in appointing additional judges and staff. These new appointments have already made an impact on the backlog and will continue to do so until the backlog is eliminated.

However there are other issues created by Agency management which we believe has an adverse affect on our ability to serve the American people. Reports of the GAO and SSA’s OIG show the Social Security disability process is plagued with serious systemic problems and that “silver bullet” solutions or attempts to scapegoat one or more classes of employees will not address, let alone solve, the problems confronting the Agency. Moreover, SSA’s plan to further reduce the backlog discloses an over-reliance on future gains from technology. In our view, the Agency has, at times, over-estimated the benefits of technology and has often implemented the technology before it has been ready for efficient use. Further, technology does little to reduce the time judges they adjudicating cases. For example, judges still need to review and develop the case before hearing, conduct the hearing, prepare the hearing decisional instructions and edit the draft decision. The Agency has previously asserted that technology, such as ePulling, will reduce the number of staff employees needed to support administrative law judges. This has not been the case. The ePulling software, reportedly able to do most of the organizing of claim files, has failed, after the investment of substantial resources.

An Agency policy has been detrimental to the American people is constant pressure on judges to continue to increase the number of cases they adjudicate. This pressure is forcing judges to hear cases before they are prepared to do so. This impairs the judge’s ability to adequately and thoroughly adjudicate cases. While some judges may be forced to hear and decide a higher volumn of cases, higher producing judges tend to pay a higher percent of claims.²

As one Hearing Office Chief Judge pointed out, If goals are too high the corners get cut and the easiest thing to do is to grant a case.”³

From this unsound practice, some claims may be reversed which should have been denied. For decades judges have paid an average of 60-70% of claims. The judges issuing up to 600 dispositions per year are still in that range. However, it appears that judges issuing more than 600 dispositions per year reverse more.

² Statement of the Hon. Patrick O’Carroll, Inspector General, SSA, before the Subcommittee on Social Security of the House Committee on Ways and Means, Sep 16 2008., page 5.

³ *Id.*

Another problem and irony in ODAR is that, in addition to a shortage of support staff in some offices, it is “top heavy” with management and management support staff. In our view, too much of the additional budget resources recently provided by Congress were allocated to the ODAR Regional Offices and the ODAR Deputy Commissioner’s office. Indeed, with a fully staffed Office of the Chief Judge, there is absolutely no need or purpose for a Deputy Commissioner’s organization at ODAR. This type of structure is archaic and is based on yesterday’s approach to management. We need forward thinking approaches to the way we manage the largest adjudicatory system in the world. The best stewards of such a system are judges.. Further in this time of declining budgets, we recommend that the number of managers in ODAR be substantially reduced and staff transferred to the hearing offices to work on disability cases. We continue to recommend that the ODAR regional offices be closed and the staff personnel be transferred to the hearing offices. There is a hearing office in each regional office city and this reform will not cause significant change of location for employees. In this electronic age, the functions of the ODAR regional offices can be more efficiently handled by the Office of the Chief Administrative Law Judge.

Finally, replacing paper files with electronic files (e-Files), begun under former Commissioner Jo Anne Barnhart, is an initiative that the AALJ endorses and supports. What is unacknowledged is that the system, like virtually all new systems, has difficulties. It needs some modifications. Moreover, it is slower for most judges to use in reviewing the file and in conducting a hearing. For many judges, electronic files slow the process because pages take longer to “load” and view. Electronic organizing of files has not yet been perfected. Electronic signing of cases still requires more time than signing with a pen. Although improving, equipment failures cause delays, some for long periods, because the system is often not capable of handling peak work loads. Judges spend too much of their work day making computer entries, work that should be assigned to staff.

JUDGE’S PRODUCTIVITY

As above noted, the pressure on judges to produce an ever increasing number of cases has reached epidemic levels. In evaluating our concerns, it is critical that members of the Subcommittee understand the role of staff in the disability claims process. When case files arrive in a hearing office, they must be “worked up” or “pulled”, that is, electronically organized for use in the hearing. This is a significant task which, if done properly, requires skill and one to three hours of time as the contents of a given file arrive in the hearing office in random sequence, unidentified, without pagination, with duplications and without any numbered exhibits or table of contents to locate the exhibits. A staff member must identify and eliminate duplications, identify exhibits from the same source, label them, arrange them in chronological order, number and paginate the exhibits and prepare the List of Exhibits. After it is worked up, the file is ready for the assigned judge to review.

The judge must review all the evidence in the file, an average of around 400 pages, and then direct staff to obtain any missing evidence. When the record is fully developed, the judge determines if a hearing is needed or whether a favorable decision can be made on the evidence of record, without a hearing. In most cases a hearing is required and the judge then determines what expert witnesses

will be required for the hearing. After this review, the staff secures the expert witnesses and schedules the case for hearing. Once the hearing is scheduled, the judge continues to be involved with the case reviewing newly submitted evidence and considering and resolving pre-hearing motions and issues. Typically, a day or two before the hearing, the judge will conduct another review of the file to review whatever additional evidence has been added and to insure familiarity with the facts and issues for the hearing. When the hearing is concluded the judge must prepare thorough decisional instructions for the writing staff and later review and edit the draft decision. Once satisfied with the decision, the judge signs it.

As earlier noted, in courts and other agencies, trials and adjudications are conducted under the adversarial process in which the case is developed during trial by evidence introduced by opposing counsel. The judge studies and reviews the evidence as the trial progresses. However, in Social Security disability hearings, administrative law judges preside over an inquisitorial process, in which the judge develops the facts and develops the arguments both for and against granting benefits. In large part, this is required because the Social Security Administration is not represented at the hearing and the courts have been sympathetic to unrepresented claimants. Therefore, Social Security judges are required to wear the so-called three hats, referenced earlier. Nearly all the evidence is gathered and entered into the record before the hearing begins. After reviewing the evidence, the judge often sees a need for additional evidence which must be obtained. The inquisitorial system places more responsibility on the judge. Hearings based on this model are more time consuming and labor intensive for the judge.

Certainly, there is variance in the number of decisions issued by each judge, however, such a distribution is normal in all human activities, usually graphed as a “bell curve”, and here it is further dependent on the numerous factors such as adequate and well trained staffing, the complexity of the cases, the number of unrepresented claimants and the sophistication of the bar. These are factors clearly beyond the control of the judges. A recent SSA OIG report⁴ which specifically addressed factors affecting hearing office productivity, confirmed this result.

Quite compelling is SSA’s last study on the issue of numerical goals for ALJs, *Plan for A New Disability Claim Process*. This study was conducted in 1994 and projected a time line for a disability claim at all levels of the process. The study, based on an average month of 4 and 1/3 weeks, concluded that a reasonable disposition rate for an administrative law judge should be in the range of 25 to 55 cases per month. The study also revealed that a judge would spend a range of 3 to 7 hours of time in processing cases.

It is acknowledged that there have been changes in the process since 1994, but, at the present time, most of those serve to slow down, not speed up the process. The average file size grows every year. The review of electronic files (eFiles) at present is slower than use of paper files. Even electronic signing (eSigning) of decisions takes several times as long as using a pen. While technology may

⁴ *Congressional Response Report: Administrative Law Judge and Hearing Office Performance*, Office of the Inspector General, Social Security Administration, A-07-08-28094.

have reduced overall processing time for claims, it has not reduced the amount of time most judges must spend in adjudicating a case.

In considering numerical performance it is important to understand that a judge must carefully review the voluminous documentary evidence in the claimant's file to effectively prepare and conduct the hearing and to issue a correct decision. Additionally, each case carries an average cost to the trust fund of \$250,000. A judge hearing 40 cases per month is entrusted to correctly decide cases valued at \$10,000,000 per month, or \$120,000,000 annually. Nonetheless, judges are being subjected to various pressures to meet ever increasing production "goals" which in many cases become *de facto* quotas. Judges are sometimes required to provide written explanations for not meeting the goals and written plans on how they intend to meet the goal, taking valuable time away from adjudicating the case. Some middle managers have actually written that judges "must" make the "goals".

The result of the pressures to meet or exceed goals often is that some judges consciously or unconsciously take shortcuts. Cases get shorter reviews, facts go unseen and incorrect decisions reached. Obviously, this is detrimental to understanding the case. In some offices judges are still being asked, or told, to accept un-worked cases, cases which have not been organized by staff. These cases will have many duplicate records, records out of sequence, exhibits unidentified and not paginated. The result is a large amount of judge hours wasted; hours which could be spent on reviewing and hearing more cases.

Reviewing our 400 page case file is not unlike reading a 400 page novel. In both instances, one must read carefully to understand the story being presented. Skipping pages in either would likely distort one's understanding of the story. However, if you skip pages in a novel, the worst that may happen is that you could be embarrassed during discussions of the novel at your book club meeting. If a judge skips evidentiary pages in a case file, the judge could make incorrect decisions in that case, harming either the claimant or the cost the American tax payers \$250,000 for the incorrect decision. Selectively reviewing evidence is a short cut that must cease; otherwise fairness and justice disappear from our adjudicatory system.

THE OHIO HEARING OFFICES

I am incredibly proud of the performance of the judges and staff in the Dayton, Cincinnati, Cleveland, Columbus and Toledo Hearing Offices over the past decade. Understaffed and flooded with a huge wave of cases, these honorable men and women worked incredibly hard to adjudicate cases. Some judges in Cleveland even attempted to implement procedures to more efficiently and effectively handle the huge volume of cases. However, such attempts were met with disdain by prior Agency management who imposed discipline on these judges for their gallant efforts. I personally know many of the judges in the Ohio Hearing Offices and have worked closely with some when we worked together at the National Labor Relations Board. Please accept my assurances that the judges in these offices are outstanding lawyers and highly competent and dedicated members of the administrative judiciary. The Ohio Hearing Offices have had to deal with the largest backlog in the nation. However, even though these judges were faced with a huge

volume of cases and substantial staff shortages they have consistently performed at levels well within the range of acceptable performance found appropriate by the Agency in its *Plan for a New Disability Claim Process*. We are proud to be associated with these dedicated, hardworking and honorable judges.

Judge Moral and Performance

There are several troublesome areas which affect performance that can and should be addressed by the Congress. Presently, judges enter the corps later in life. Several years ago, the average age of new judges was 57. For a full pension, those judges must work until age 87. Presently, we have a large number of judges in their late 70's and 80's. Many of these judges prefer to retire but without a full pension cannot do so. We have introduced HR 2850, which corrects this unfortunate circumstance by permitting an earlier retirement. This bill is fully funded by increased pension contributions, a fact which has been confirmed by the Congressional Budget Office. We respectfully request that you support this important legislation during the Lame Duck session.

Another important legislative initiative for administrative law judges is S. 1228 introduced by Senator Akaka. This bill is intend to correct a misinterpretation by the Office of Personnel Management of the Federal Workforce Flexibility Act, enacted in 2004. This legislation, which was also sponsored by Senator Akaka, permitted Agency's to credit private sector experience for purposes of leave. At the time of passage, OPM arbitrarily declined to follow its previous policy of including aljs along with members of the Senior Executive Service when implementing legislation providing similar benefits. S 1228 corrects this erroneous interpretation. We urge that you also support this legislation during the Lame Duck session.

Finally, security in our courtrooms has become a substantial concern to practically every judge. Threats of violence and bodily harm are regularly made to judges by claimants whose cases are denied. In addition, threats of bodily harm and violence are being made against the spouses and children of our judges. Such threats have been specific and have included, on occasion, the address of the judge. The AALJ is extremely concerned that these threats will be acted upon. Previously, two judges have been forced to take retirement because of injuries sustained by claimants in the hearing office. We simply cannot let this happen again. While the Agency has taken some steps to improve security, much, much more is needed.

Our security needs must be addressed promptly. We urge your quick and effective oversight to ensure that no more judges receive disabling injuries or that members of their families fall in harms way.

SSA has probably the largest adjudicatory system in the world. With the support of the Congress, it should also have the best.

Conclusion

I want to thank you on behalf of the AALJ for this opportunity to be heard today and present you our views on these important issues. We are most hopeful that you will further pursue the issues we raise to ensure that claimants receive a full and fair due process hearing by administrative law judges. The Social Security Program is absolutely vital to the American people. Our judges are working extremely hard to address the backlog of cases under the most adverse of circumstances. We truly appreciate your support.

Senator Voinovich, I particularly want to thank you for your support of the administrative judiciary over the years. We wish you well as you enter a new phase in your life.