
**HEARING BEFORE**

**THE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS**
**PERMANENT SUBCOMMITTEE ON INVESTIGATIONS**

**UNITED STATES SENATE**

**SEPTEMBER 13, 2012**

**STATEMENT**
**OF**
**JUDGE DEBRA BICE**
**CHIEF ADMINISTRATIVE LAW JUDGE**
**OFFICE OF DISABILITY ADJUDICATION AND REVIEW**
**SOCIAL SECURITY ADMINISTRATION**

Chairman Levin, Ranking Member Coburn, and Members of the Subcommittee:

Thank you for the opportunity to appear before you today. My name is Judge Debra Bice, and I am the Chief Administrative Law Judge at the Social Security Administration. I am responsible for overseeing approximately 1,500 administrative law judges (ALJ) in the Office of Disability Adjudication and Review (ODAR). My testimony will focus on the process through which we determine disability at all adjudicative levels across the agency. My testimony will also address the challenges we face hiring, managing, and disciplining our judge corps.

## How We Determine Disability—The Sequential Evaluation Process

Our general process for determining disability is admittedly complicated, but it is necessarily complex to meet the requirements of the law as designed by Congress.[1]

We evaluate adult claimants for disability under a standardized five-step evaluation process (sequential evaluation), which we formally incorporated into our regulations in 1978. At step one, we determine whether the claimant is engaging in substantial gainful activity (SGA). SGA is significant work normally done for pay or profit. The *Social Security Act* (Act) establishes the SGA earnings level for blind persons and requires us to establish the SGA level for other disabled persons.[2] If the claimant is engaging in SGA, we deny the claim without considering medical factors.

[1] Section 223(d) of the Act defines "disability" as "the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or in the case of an individual who has attained the age of 55 and is blind (within the meaning of 'blindness' as defined in section 216(i)(1)), inability by reason of such blindness to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he has previously engaged with some regularity and over a substantial period of time. An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), 'work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions of the country. In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Commissioner of Social Security shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Commissioner of Social Security does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process. An individual shall not be considered to be disabled for purposes of this title if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled. For purposes of this subsection, a 'physical or mental impairment' is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

[2] For blind persons, the SGA earnings limit is currently $1,690 a month. Currently, other disabled persons are engaging in SGA if they earn more than $1,010 a month. Both SGA amounts are indexed annually to average wage

If a claimant is not engaging in SGA, at step two, we assess the existence, severity, and duration of the claimant's impairment (or combination of impairments). The Act requires us to consider the combined effect of all of a person's impairments, regardless of whether any one impairment is severe. Throughout the sequential evaluation, we consider all of the claimant's physical and mental impairments singly and in combination.

If we determine that the claimant does not have a medically determinable impairment, or that the impairment or combined impairments are "not severe" because they do not significantly limit the claimant's ability to perform basic work activities, we deny the claim at the second step. If the impairment is "severe," we proceed to the third step.

*Listing of Impairments*

At the third step, we determine whether the impairment "meets" or "equals" the criteria of one of the Listing of Impairments (Listings) in our regulations.

The Listings describe for each major body system the impairments considered so severe that we can presume that they would prevent an adult from working. The Act does not require the Listings, but we have been using them in one form or another since 1955. The listed impairments are permanent, expected to result in death, or last for a specific period greater than 12 months.

Using the rulemaking process, we revise the Listings' criteria on an ongoing basis. The Listings are a critical factor in our disability determination process, and we are committed to updating each listing at least every five years. In the last five years, we have revised five of 14 body systems in the Listings, and in FY 2013 we plan to revise two more body systems and obtain public comments on the remaining seven body systems. When updating a listing, we consider current medical literature, information from medical experts, disability adjudicator feedback, and research by organizations such as the Institute of Medicine. As we update entire body systems, we also make targeted changes to specific rules as necessary.

If the claimant has an impairment that meets or equals the criteria in the Listings, we allow the disability claim without considering the claimant's age, education, or past work experience.

As part of our process at step three, we developed an important initiative—our Compassionate Allowances (CAL) initiative—that allows us to identify claimants who are clearly disabled because the nature of their disease or condition clearly meets the statutory standard for disability. With the help of sophisticated new information

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growth, using the National Average Wage Index. However, the Act specifies that we cannot necessarily count all the person's earnings. For example, we deduct impairment-related work expenses when we consider whether a person is engaging in SGA.

technology, we can quickly identify potential Compassionate Allowances and then swiftly make decisions. We currently recognize 165 CAL conditions, and we expect to expand the list later this year. We continue to review our CAL policy to ensure we base it on the most up-to-date medical science.

*Residual Functional Capacity*

A claimant who does not meet or equal a listing may still be disabled. The Act requires us to consider how a claimant's condition affects his or her ability to perform past relevant work or, considering his or her age, education, and work experience, other work that exists in the national economy. Consequently, we assess what the claimant can still do despite physical and mental impairments—i.e., we assess his or her residual functional capacity (RFC). We use that RFC assessment in the last two steps of the sequential evaluation.

We developed a regulatory framework to assess RFC. An RFC assessment must reflect a claimant's ability to perform work activity on a regular and continuing basis (i.e., eight hours a day for five days a week, or an equivalent work schedule). We assess the claimant's RFC based on all of the evidence in the record, such as treatment history, objective medical evidence, and activities of daily living.

We must also consider the credibility of a claimant's subjective complaints, such as pain. Such complaints are inherently difficult to assess. Under our regulations, disability adjudicators use a two-step process to evaluate credibility. First, the adjudicator must determine whether medical signs and laboratory findings show that the claimant has a medically determinable impairment that could reasonably be expected to produce the pain or other symptoms alleged. If the claimant has such an impairment, the adjudicator must then consider all of the medical and non-medical evidence to determine the credibility of the claimant's statements about the intensity, persistence, and limiting effects of symptoms. The adjudicator cannot disregard the claimant's statements about his or her symptoms simply because the objective medical evidence alone does not fully support them.

The courts have influenced our rules about assessing a claimant's disability. For example, when we assess the severity of a claimant's medical condition, we historically have given greater weight to the opinion of the physician or psychologist who treated that claimant. While the courts generally agreed that adjudicators should give special weight to treating source opinions, the courts formulated different rules about how adjudicators should evaluate treating source opinions. In 1991, we issued regulations that explain how we evaluate treating source opinions.[3] However, the courts have continued to interpret opinions from treating physicians in conflicting ways.

[3] Under those regulations, we will give controlling weight to a treating physician's opinion if it is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the record. In that case, a disability adjudicator must adopt a treating source's medical opinion regardless of any finding he or she would have made in the absence of the medical opinion.

Once we assess the claimant's RFC, we move to the fourth step of the sequential evaluation.

*Medical-Vocational Decisions (Steps Four and Five)*

At step four, we consider whether the claimant's RFC prevents the claimant from performing any past relevant work. If the claimant can perform his or her past relevant work, we deny the disability claim.

If the claimant cannot perform past relevant work (or if the claimant did not have any past relevant work), we move to the fifth step of the sequential evaluation. At step five, we determine whether the claimant, given his or her RFC, age, education, and work experience, can do other work that exists in the national economy. If a claimant cannot perform other work, we will find that the claimant is disabled.

We use detailed vocational rules to minimize subjectivity and promote national consistency in determining whether a claimant can perform other work that exists in the national economy. When we issued these rules in 1978, we noted that the Committee on Ways and Means, in its report accompanying the *Social Security Amendments of 1967*, said that:

> It is, and has been, the intent of the statute to provide a definition of disability which can be applied with uniformity and consistency throughout the nation, without regard to where a particular individual may reside, to local hiring practices or employer preferences, or to the state of the local or national economy.[4]

The medical-vocational rules, set out in a series of "grids," relate age, education, and past work experience to the claimant's RFC to perform work-related physical activities. Depending on those factors, the grid may direct us to allow or deny a disability claim. For cases that do not fall squarely within a vocational rule, we use the rules as a framework for decision-making. In addition, an adjudicator may rely on a vocational expert to identify other work that a claimant could perform.

## How We Determine Disability—The Administrative Process

The Supreme Court has accurately described our administrative process as "unusually protective" of the claimant.[5] Indeed, we strive to ensure that we make the correct decision as early in the process as possible, so that a person who truly needs disability benefits receives them in a timely manner. In most cases, we decide claims for benefits using an administrative review process that consists of four levels: (1) initial

[4] 43 Fed. Reg. 55349, 55350 (1978) (quoting H.R. Rep. No. 544, 90th Congress, 1st Sess., at 30 (1967)).

[5] *Heckler v. Day*, 467 U.S. 104 (1984).

determination; (2) reconsideration determination; (3) hearing; and (4) appeals.[6] At each level, the decision-maker bases his or her decisions on provisions in the Social Security Act (Act) and regulations, as outlined above.

*Initial and Reconsideration Determinations*

In most States, a team consisting of a State disability examiner and a State agency medical or psychological consultant makes an initial determination at the first level. The Act requires this initial determination.[7] A claimant who is dissatisfied with the initial determination may request reconsideration, which is performed by another State agency team. In turn, a claimant who is dissatisfied with the reconsidered determination may request a hearing.[8]

*Hearing Level*

We have over 70 years of experience in administering the hearings and appeals process. Since the passage of the *Social Security Amendments of 1939*, the Act has required us to hold hearings to determine the rights of individuals to old-age and survivors' insurance benefits.

Over the years, the numbers of ALJs and hearing offices rapidly grew as the Social Security program grew. Recently, we added staff to help us meet growing demand and allow us to focus our resources on those parts of the country with the greatest need for hearings. In addition, we have expanded the use of video hearings, opened five National Hearing Centers to deal only with backlogged cases by video, and realigned the service areas of some of our offices. However, the attributes of the hearings and appeals process have remained essentially the same since 1940. When it established the hearings and appeals process in 1940, the Social Security Board sought to balance the need for accuracy and fairness to the claimant with the need to handle a large volume of claims in an expeditious manner.[9] Those twin goals still motivate us. As the

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[6] 20 C.F.R. §§ 404.900, 416.1400. My testimony focuses on disability determinations, but the review process generally applies to any appealable issue under the Social Security programs.

[7] Sections 205(b) and 1631(c)(1)(A) of the Act, 42 U.S.C. §§ 405(b), 1383(c)(1)(A).

[8] For disability claims, 10 States participate in a "prototype" test under 20 C.F.R. §§ 404.906, 416.1406. In these States, we eliminated the reconsideration step of the administrative review process. Claimants who are dissatisfied with the initial determinations on their disability cases may request a hearing before an ALJ. The 10 States participating in the prototype test are Alabama, Alaska, California (Los Angeles North and West Branches), Colorado, Louisiana, Michigan, Missouri, New Hampshire, New York, and Pennsylvania.

[9] Basic Provisions Adopted by the Social Security Board for the Hearing and Review of Old-Age and Survivors Insurance Claims, at 4-5 (January 1940).

Supreme Court has observed, the Social Security hearings system "must be fair—and it must work."[10]

When a hearing office receives a request for hearing from a claimant, the case file is prepared by hearing office staff prior to the case being assigned to a judge and scheduled for hearing. The ALJ decides the case *de novo,* meaning that he or she is not bound by the determinations made at prior levels of the disability process. The ALJ reviews any new medical or other evidence that was not available to prior adjudicators. The ALJ will also consider a claimant's testimony and the testimony of medical and vocational experts called for the hearing. Since the ALJ considers additional evidence and testimony, his or her decision to allow an appeal does not necessarily mean that the earlier decision was incorrect based on the evidence available at the time. If a review of all of the evidence supports a decision fully favorable to the claimant without holding a hearing, the ALJ or attorney adjudicator may issue an on-the-record fully favorable decision.[11]

In contrast to Federal court proceedings, our ALJ hearings are non-adversarial. Formal rules of evidence do not apply, and the agency is not represented except by the ALJ, who has dual responsibilities.[12] At the hearing, the ALJ takes testimony under oath or affirmation. The claimant may elect to appear in-person at the hearing or consent to appear via video. The claimant may appoint a representative (either an attorney or non-attorney) who may submit evidence and arguments on the claimant's behalf, make statements about facts and law, and call witnesses to testify. The ALJ may call vocational and medical experts to offer opinion evidence, and the claimant or the claimant's representative may question these witnesses.

If, following the hearing, the ALJ believes that additional evidence is necessary, the ALJ may leave the record open and conduct additional post-hearing development; for example, the ALJ may order a consultative exam. Once the record is complete, the ALJ considers all of the evidence in the record and makes a decision. The ALJ decides the case based on a preponderance of the evidence in the administrative record. A

[10] *Richardson v. Perales*, 402 U.S. 389, 399 (1971).

[11] Under the Attorney Adjudicator program, our most experienced attorneys spend a portion of their time making on-the-record, disability decisions in cases where enough evidence exists to issue a fully favorable decision without waiting for a hearing. 20 C.F.R. §§ 404.942, 416.1442.

[12] Starting in the 1970s under Commissioner Ross, we tried to pilot an agency representative position at select hearing offices. However, a United States District Court held that the pilot violated the Act, intruded on ALJ independence, was contrary to congressional intent that the process be "fundamentally fair," and failed the constitutional requirements of due process. *Salling v. Bowen*, 641 F. Supp. 1046 (W.D. Va. 1986). We subsequently discontinued the pilot due to the testing interruptions caused by the *Salling* injunction, general fiscal constraints, and intense congressional opposition. Congress originally supported the project; however, we experienced significant congressional opposition once the pilot began. For example, Members of Congress introduced legislation to prohibit the adversarial involvement of any government representative in Social Security hearings, and 12 Members of Congress joined an *amicus* brief in the *Salling* case opposing the project.

claimant who is dissatisfied with the ALJ's decision generally has 60 days after he or she receives the decision to ask the Appeals Council (AC) to review the decision.[13]

*Appeals Council*

Upon receiving a request for review, the AC evaluates the ALJ's decision, all of the evidence of record, including any new and material evidence that relates to the period on or before the date of the ALJ's decision, and any arguments the claimant or his or her representative submits. The AC may grant review of the ALJ's decision, or it may deny or dismiss a claimant's request for review. The AC will grant review in a case if there appears to be an abuse of discretion by the ALJ; there is an error of law; the actions, findings, or conclusions of the ALJ are not supported by substantial evidence; or if there is a broad policy or procedural issue that may affect the general public interest.

If the AC grants a request for review, it may uphold part of the ALJ's decision, reverse all or part of the ALJ's decision, issue its own decision, remand the case to an ALJ, or dismiss the original hearing request. When it reviews a case, the AC considers all the evidence in the ALJ hearing record (as well as any new and material evidence), and when it issues its own decision, it bases the decision on a preponderance of the evidence.

If the claimant completes our administrative review process and is dissatisfied with our final decision, he or she may seek review of that final decision by filing a complaint in Federal District Court. However, if the AC dismisses a claimant's request for review, he

[13] The Appeals Council is headquartered in Falls Church, Virginia. It is our last administrative decisional level. Created on March 1, 1940 as a three-member body, the Appeals Council was established to oversee the hearings and appeals process, promote national consistency in hearing decisions made by referees (now ALJs) and ensure that the Social Security Board's (now the Commissioner's) records were adequate for judicial review. The Appeals Council has grown over time due to the growth in the increasingly complex programs it reviews and the increased number of requests for review that it receives. Currently, the Appeals Council is made up of approximately 75 Administrative Appeals Judges, 56 Appeals Officers, and several hundred support personnel. The Appeals Council is physically located in Falls Church, Virginia with additional offices in Crystal City, Virginia, and in Baltimore, Maryland. Cases originate in hearing offices throughout the country. The Appeals Council looks at each case in which a request for review is filed (over 173,000 in FY 2011). The Appeals Council may grant, deny, or dismiss a request for review. If the Appeals Council grants the request for review, it will either decide the case or return ("remand") it to an ALJ for a new decision. The Council also performs quality review, policy interpretations, and court-related functions. The Appeals Council is the core component of the Office of Appellate Operations, one of the parts of our Office of Disability Adjudication and Review. The Office of Appellate Operations provides professional and clerical support for the Appeals Council, and also maintains and controls files in cases decided adversely to claimants by ALJs and the Appeals Council, in case a further administrative or court appeal is filed. When a claimant brings a civil action against the Commissioner seeking judicial review of the agency's final decision, staff in the Office of Appellate Operations prepare the record of the claim for filing with the Court. This includes all the documents and evidence the agency relied upon in making the decision or determination.

or she cannot appeal that dismissal; instead, the ALJ's decision becomes the final decision.

*Federal Level*

If the AC makes a decision, it is our final decision. If the AC denies the claimant's request for review of the ALJ's decision, the ALJ's decision becomes our final decision. A claimant who wishes to appeal our final decision has 60 days after receipt of notice of the AC's action to file a complaint in Federal District Court.

In contrast to the ALJ hearing, Federal courts employ an adversarial process. In District Court, an attorney usually represents the claimant and attorneys from the United States Attorney's office or our Office of the General Counsel represent the Government. When we file our answer to that complaint, we also file with the court a certified copy of the administrative record developed during our adjudication of the claim for benefits.

The Federal District Court considers two broad inquiries when reviewing one of our decisions: whether we correctly followed the Act and our regulations, and whether our decision is supported by substantial evidence of record. On the first inquiry—whether we have applied the law correctly—the court typically will consider issues such as whether the ALJ correctly evaluated the claimant's testimony or the treating physician's opinion, and whether the ALJ followed the correct procedures.

On the second inquiry, the court will consider whether the factual evidence developed during the administrative proceedings supports our decision. The court does not review our findings of fact *de novo*, but rather, considers whether those findings are supported by substantial evidence. The Act prescribes the "substantial evidence" standard, which provides that, on judicial review of our decisions, our findings "as to any fact, if supported by substantial evidence, shall be conclusive." The Supreme Court has defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[14] The reviewing court will consider evidence that supports the ALJ's findings as well as evidence that detracts from the ALJ's decision. However, if the court finds there is conflicting evidence that could allow reasonable minds to differ as to the claimant's disability, and the ALJ's findings are reasonable interpretations of the evidence, the court must affirm the ALJ's findings of fact. In practice, courts in many parts of the country do not apply the substantial evidence standard as Congress intended, which results in many inappropriate remands.

If, after reviewing the record as a whole, the court concludes that substantial evidence supports the ALJ's findings of fact and the ALJ applied the correct legal standards, the court will affirm our final decision. If the court finds either that we failed to follow the correct legal standards or that our findings of fact are not supported by substantial evidence, the court typically remands the case to us for further administrative

[14] *Consolidated Edison Co. of New York v. N.L.R.B.,* 305 U.S. 197 (1938).

proceedings, or in rare instances, reverses our final decision and finds the claimant eligible for benefits.

## ALJ Hiring, Management Oversight, and Disciplinary Processes

In order to issue timely, fair, and quality decisions in our hearings and appeals process, we must have the appropriate tools to hire, manage, and discipline our judge corps without infringing on their qualified decisional independence.

*Hiring Process*

On Commissioner Astrue's watch, we have raised the standards for ALJ selection, hiring people who we believe will take seriously their responsibility to the American public. We have hired 794 judges since 2007. Insistence on the highest possible standards in judicial conduct is a prudent investment for taxpayers, especially since ALJs may be removed only for good cause established and determined by the Merit Systems Protection Board.

We originally planned to hire 125 ALJs in September of FY 2012; however, we ultimately decided to hire 46 judges who will report on September 23, 2012.

We depend on OPM to provide us with a register of qualified ALJ candidates. During the *Azdell* litigation, which began in the late 1990s, use of the register was temporarily frozen due to an MSPB decision that was subsequently overturned by the United States Court of Appeals in 2003 (at which time OPM was able to reopen the then-existing register to agency requests for certificates). Since 2003, however, OPM not only re-opened the then-existing register, but also established a new examination, administered it three times, generally, beginning in 2007, and established (and subsequently supplemented) a new register. For our hearing process to operate efficiently, we need ALJs who can treat people with dignity and respect, be proficient at working electronically, handle a high-volume workload without sacrificing quality, and make swift and sound decisions in a non-adversarial adjudication setting.

OPM should continue to engage the agencies who hire ALJs and some authoritative outside groups, such as the Administrative Conference of the United States and the American Bar Association, to incorporate their expertise in the ALJ examination process. I would like to point out that the total number of Federal ALJs is 1,726 as of March 2012, and our corps represents about 86 percent of the Federal ALJ corps—we have the greatest stake in ensuring that the criteria and hiring process meet our needs, but recognize that OPM is required to produce an examination that meets the needs of the Government – and the public it serves – as a whole, pursuant to congressional directives.

*Management Oversight and Disciplinary Processes*

Under Commissioner Astrue's leadership, we have not hesitated to hold ALJs accountable where the law permits. Although the *Administrative Procedure Act* (APA) does not expressly state that ALJs must comply with the statute, regulations, or sub-regulatory policies and interpretations of law and policy articulated by their employing agencies, both the courts[15] and the Department of Justice's Office of Legal Counsel[16] have opined that ALJs are subject to the agency on matters of law and policy.

One of Congress' goals in passing the APA was to protect the due process rights of the public by ensuring that impartial adjudicators conduct agency hearings. Employing agencies are limited in their authority over ALJs, and Federal law precludes management from using many of the basic tools applicable to the vast majority of Federal employees. Specifically, OPM sets ALJs' salaries independent of agency recommendations or ratings. ALJs are exempt from performance appraisals, and they cannot receive monetary awards or periodic step increases based on performance. In addition, our authority to discipline ALJs is restricted by statute. We may take certain measures, such as counseling or issuing a reprimand, to address ALJ underperformance or misconduct. However, we cannot take stronger measures against an ALJ, such as removal or suspension, reduction in grade or pay, or furlough for 30 days or less, unless the Merit Systems Protection Board (MSPB) finds that good cause exists.[17]

We have taken affirmative steps to address egregiously underperforming ALJs. With the promulgation of our "time and place" regulation, we have eliminated arguable ambiguities regarding our authority to manage scheduling, and we have taken steps to ensure that judges are deciding neither too few nor too many cases. By management instruction, we have limited assignment of new cases to no more than 1,200 cases annually.

Our Hearing Office Chief Administrative Law Judges (HOCALJ) and Hearing Office Directors work together to identify workflow issues. If they identify an issue with respect to an ALJ, the HOCALJ discusses that issue with the judge to determine whether there are any impediments to moving the cases along in a timely fashion and advise the judge

[15] "An ALJ is a creature of statute and, as such, is subordinate to the Secretary in matters of policy and interpretation of law." *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir.) (citing Mullen, 800 F.2d at 540-41 n. 5 and *Association of Administrative Law Judges v. Heckler*, 594 F. Supp. 1132, 1141 (D.D.C. 1984)), cert. denied, 493 U.S. 812 (1989).

[16] "Administrative law judges have no constitutionally based judicial power. . . . As such, ALJs are bound by all policy directives and rules promulgated by their agency, including the agency's interpretations of those policies and rules. . . . ALJs thus do not exercise the broadly independent authority of an Article III judge, but rather operate as subordinate executive branch officials who perform quasi-judicial functions within their agencies. In that capacity, they owe the same allegiance to the Secretary's policies and regulations as any other Department employee." Authority of Education Department Administrative Law Judges in Conducting Hearings, 14 Op. Off. Legal Counsel 1, 2 (1990).

[17] The MSPB makes this finding based on a record established after the ALJ has an opportunity for a hearing.

of steps needed to address the issue. If necessary, the Regional Chief ALJ and the Office of the Chief ALJ provide support and guidance.[18]

Generally, this process works. The vast majority of issues are resolved informally by hearing office management. When they are not, management has the authority to order an ALJ to take a certain action or explain his or her actions. ALJs rarely fail to comply with these orders. In those rare cases where the ALJ does not comply, we pursue disciplinary action. Our overarching goal is to provide quality service to those in need and instill that goal in all of our employees, including ALJs.

The current system limits how we address the tiny fraction of ALJs who hear only a handful of cases or engage in misconduct. A few years ago, we had an ALJ in Georgia who failed to inform us, as required, that he was also working full-time for the Department of Defense. Another ALJ was arrested for committing a serious domestic assault. We were able to remove these ALJs, but only after completing the lengthy MSPB disciplinary process that lasts several years and can consume over a million dollars of taxpayer resources.[19] In each of these cases, unlike disciplinary action against all other civil servants, the ALJs received their full salary and benefits until the case was finally decided by the full MSPB—even though they were not deciding cases. We are open to exploring options to address these issues, while ensuring the qualified decisional independence of these judges.

## Conclusion

Our highly-trained disability adjudicators follow a complex process for determining disability according to the requirements of the law as designed by Congress. I look forward to reviewing the Subcommittee's report concerning 300 disability cases. Without having seen the report, I will do my best to answer any questions you may have today. Although the report will be severely limited by the statistically non-representative sample of cases that was studied, I am nonetheless hopeful that the report will identify data that merit further research.

[18] Our managerial ALJs play a key role in ALJ performance. They provide guidance, counseling, and encouragement to our line ALJs. However, the current pay structure does not properly compensate them. For example, due to pay compression, a line ALJ in a Pennsylvania hearing office can earn as much as our Chief Administrative Law Judge. Furthermore, our leave rules limit the amount of annual leave an ALJ can carry over from one year to the next. These compensation rules discourage otherwise qualified ALJs from pursuing management positions, and the APA prevents us from changing those rules.

[19] Since 2007, we have filed removal charges with the MSPB against nine ALJs. The MSPB upheld our removal charges against five ALJs; three ALJs left the agency or retired in lieu of removal. One removal action is currently awaiting a decision from the MSPB. Additionally, from 2007 to present, we either sought to file or filed charges seeking suspension against 29 ALJs. Of these ALJs, 22 were suspended, six either retired or separated from the agency; and one case is currently before the MSPB.

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