Social Security Advisory Board

Issue Brief #3

Recruiting SSA Administrative Law Judges: Need for review of OPM role and performance

April 2007

The Administrative Procedure Act (APA) in 1946 established the position of administrative law judge (ALJ). It included provisions designed to ensure the ALJs' impartiality by insulating them from improper pressure. As one way of strengthening independence, the APA gave the then Civil Service Commission responsibility for administering the personnel aspects of the ALJ program. (The functions of the Civil Service Commission have since been transferred to OPM, the Office of Personnel Management.)

There is no doubt and no disagreement that Administrative Law Judges must have the independence to make decisions that both are and are perceived to be based on their best objective assessment of the facts in each case without being influenced by the need to please supervisors, to meet allowance or denial quotas, or in any way to fear that the outcome of their decisions will affect their future status with the agency.

In the 60 years since the inception of the APA, the size of the ALJ corps, as well as the role of the administrative law judges at SSA has changed. The recruitment process should reflect today's environment.

Modernize Recruitment

Without in any way diminishing the importance of assuring decisional independence of ALJs, the Social Security Advisory Board notes that there are additional objectives that must also be met in the hiring of ALJs who adjudicate Social Security claims. Applicants are entitled to have their claims adjudicated not only fairly but also promptly. Taxpayers are entitled to know that agency employees, including and perhaps especially highly compensated employees, are suited for their important role and are able to and do maintain high standards of productivity. Potential applicants for administrative law judge positions are entitled to be fairly considered for these positions on the basis of their qualifications. It is not clear that these additional and important objectives have been or are now being adequately met. The Board believes that the Administration and the Congress should carefully review the existing system for recruiting ALJs to assure that standards of independence are maintained and that the selection process provides candidates for these important positions in sufficient numbers and with the appropriate qualifications.

Today's world is much different from that of 1946 when the APA was adopted. Because of the growth in SSA's disability programs, it now employs more than 80 percent of all federal ALJs. And the work done by SSA's

ALJs is different in kind and in quantity from that performed by ALJs in regulatory agencies, which were at the forefront of Congress's attention when it passed the APA.

Social Security's ALJs are responsible for decisions that crucially affect the lives of claimants and, in the aggregate, involve billions of program dollars. Yet, the agency has almost no say in how they are recruited or under what standards. Currently, the agency must hire for this important position from a limited OPM register drawn from a pool of applicants who do not necessarily have the specific characteristics needed by the agency. Moreover, for the past several years that pool mostly consists of individuals whose job applications were filed over half a decade ago. This system for hiring senior employees would be inconceivable in any well run business operation and badly serves both the agency and the public. The Congress should look into options for improving the ALJ selection process so that it better serves the public's needs.

ALJ Recruitment and Selection Process

The Office of Personnel Management administers the government-wide selection process for ALJs. ALJs are employed at 29 Cabinet-level and independent agencies. As of September 2006, 1,402 ALJs were employed by the Federal government, of whom 1,146, or 82 percent of the total, worked for SSA. Agencies hiring ALJs reimburse OPM for its cost of administering the selection process in proportion to their share of the number of ALJs on duty. OPM has estimated SSA's costs for FY 2007 at slightly more than $1 million.

OPM is responsible for developing an ALJ examination, determining qualifications of applicants, conducting examinations, scoring applicants, maintaining a register, preparing certificates of eligibles in response to requests from employing agencies, and auditing the selection process to ensure compliance with applicable civil service laws.

The names of all eligible ALJ candidates are maintained by OPM on a register that reflects their examination score, veteran status, and geographic preferences. Upon request from SSA, OPM prepares a certificate of eligibles containing the names of the highest scoring ALJ candidates who have expressed a willingness to accept a position in offices where SSA has vacancies. OPM generally provides 3 or 4 candidates for each vacancy identified. SSA then interviews the candidates and makes selections.

SSA's Inability to Hire can be Traced to the 1993 Register of Qualified Applicants

In recent years, SSA's ability to hire any ALJs has been severely limited by OPM's handling of ALJ recruitment generally and by its failure to devote the necessary resources and attention to developing a current register of qualified applicants.

In 1993, OPM established a new examination for prospective candidates to become ALJs. A 1996 OPM Inspector General investigation into fraudulent scoring of the examination led to a

rescoring of all applicants with the result that 80 percent of applicants failed to meet the minimum qualifying requirements. OPM's response was to change the requirements so that all applicants with 7 years experience as attorneys involved in litigation or administrative hearings were automatically given a passing score of 70 so that they all "made the register." Their relative ranking was based on a 30 point scale reflecting their scores from a written demonstration, personal interview, and references.

The Social Security Administration wrote to OPM expressing concern over the impact of the revised scoring on the composition of the selection registers; however, OPM proceeded with the approach described above.

Appeals and litigation delayed the hiring process for 4 years, but when it was reinstated SSA found that the register was outdated.

In 1997, some applicants who felt they were unfairly treated by the change in scoring, asked the Merit Systems Protection Board (MSPB) to overturn it. They raised a number of objections. One complaint was that OPM had inappropriately given itself a waiver from meeting the regulatory requirements, including a requirement that the test should be based on job analysis of the knowledge, skills, and abilities necessary to perform the duties of the job. Another, particularly key, argument related to veterans preference. Under the original test rules, disabled veterans received 10 points out of the total of 100. Under the revised rules they received 10 points out of 30. The MSPB administrative law judge who heard the case found that OPM had violated its own regulations requiring that the selection process have a rational relationship to the skills and that the way it applied veterans preferences violated the Veterans Preference Act. He ordered OPM to give priority in selection to those who had been disadvantaged by the new OPM scoring rules. The decision was appealed to the full Merit Systems Protection Board, which, in April 1999, upheld the decision.

OPM did not accept the MSPB ruling nor did it act to develop a new exam and register that would have been in accord with its rules, Instead, it decided to sue the MSPB over the issue. Pending the outcome of the litigation, agencies were not allowed to fill ALJ positions. As a result, SSA was, with one exception[1], unable to hire any new ALJs from April 1999 until the suit was finally settled in 2003 by a decision of the Court of Appeals for the Federal District that the Supreme Court declined to review. The Court decision agreed that MSPB lacked jurisdiction to decide whether the provisions of the Veterans Preference Act were violated. It noted that OPM admitted that the selection process violated the rule requiring that it be based on a job analysis of the skills and abilities necessary to perform the responsibilities of the job. However, it found in favor of OPM on the grounds that a 1978 executive order gave OPM the right to grant itself a variation from its own regulations.

[1] In one instance, the parties to the lawsuit agreed to a one-time exception to the freeze on hiring from the ALJ register so that SSA could meet a critical shortage by hiring 125 ALJs in 2002.

In August 2003, pending the development of a new exam, OPM reactivated the existing register but closed it to the receipt of new applications other than those with the 10-point veterans preference (primarily disabled veterans). OPM contacted candidates on the register to ask them if they were still interested in being considered for an ALJ position. They were allowed (but not required) to update their resumes for informational purposes. SSA has, therefore, been limited to hiring ALJs from the old register of applicants from the 1990s.

Implementation on the Horizon?

Despite promises made to expedite the implementation of a new selection process, the earliest that OPM could establish a new register of qualified applicants will be mid-2007 – 8 years since the MSPB decisions that essentially stopped the recruitment process.

Concerns over the need to expedite the issuance of a new register were communicated to OPM by the Social Security Administration. They were also raised by members of Congress in connection with a hearing on the disability adjudication process. The issue was also discussed in a meeting of this Board with the General Counsel of OPM. OPM responded to these concerns by indicating that it intended to proceed expeditiously with the development of a new examination and issuance of a new register. At this point April 2007—over 4 years since the circuit court decision—the new examination has not yet been completed.

In December 2005, OPM issued draft regulations needed to clear the way for a new examination. A large number of comments were received in response to that draft. On December 26, 2006 OPM sent the draft final regulations to the Office of Management and Budget. The final regulation was published on March 20, 2007 and was in effect as of April 19. How long it will take to establish a new register of candidates will depend in part on how many applicants there are. The new examination will probably have a written exercise and a panel interview with sitting ALJs, so it will take time to schedule and conduct it. Scoring will take additional time. The bottom line is that the earliest SSA will be able to select ALJs from a new register will be late-2007, more than 8 years since the MSPB decision that prevented it from hiring new ALJs from the old register.

SSA was forced to weigh the need to hire additional ALJs against the likelihood that the register of best possible candidates had been depleted.

From 2004 to the present, SSA has hired 238 new ALJs from the old register. SSA has concerns with the quality of the existing register. OPM has stated that it continues to be able to provide qualified candidates to agencies using ALJs and that only qualified candidates are on the register. SSA's concern, however, is not whether candidates meet OPM's minimum qualifications. Rather, SSA wants to get the best possible candidates for this

important position. The ALJs that SSA selects will, in all likelihood, be in their positions for a long time. ALJ positions are, in effect, life-tenured, and OPM data show that SSA's current ALJs have been on the job an average of 20 years. ALJs are essential to SSA's service delivery mission, and it is important that the agency find candidates that can provide the quantity and quality of service that the public has a right to expect. SSA would have reason to believe that the best candidates who were on the register have already been selected. It is not unlikely that there are many potential applicants with more skills and higher qualifications than many currently on the register. SSA currently faces a huge backlog of claimants waiting for a hearing. While the reasons for this backlog are many, SSA actions to cope with normal ALJ turnover (about 50 per year) and possibly to expand its ALJ corps will be more effective to the extent that it can choose from an up-to-date register.

SSA's unique needs

SSA employs the vast majority of ALJs in the federal government and its unique job requirements as well as the extraordinary workload demand tailored qualifications.

The situation with respect to recruitment of ALJs as it has developed over the past several years has complicated the ability of SSA to carry out its important mission of providing prompt and accurate adjudication of benefit claims. This situation needs to be resolved quickly, but it also should be resolved in a way that both prevents a recurrence and also assures that the unique role of ALJs in carrying out the mission of the Social Security Administration is appropriately addressed.

The work that SSA ALJs do in making decisions on claims for benefits can be distinguished from that done by ALJs at regulatory agencies, such as the Securities and Exchange Commission or the Federal Communications Commission. SSA ALJs handle many more cases and make many more decisions each year than ALJs in regulatory agencies. SSA's hearings are different from those of regulatory agencies, where all parties are generally represented by specialized counsel. Although most SSA claimants are represented, the agency is not. SSA ALJs are responsible for developing the record and protecting the interests of the parties as well as reaching an independent decision. Conducting Social Security hearings therefore requires certain skills that go beyond those needed by government ALJs generally. Not everyone on the current register meets those skill requirements. As a Hearing Office Chief ALJ told us, "A difficult thing about hiring new ALJs is finding ones who are not shocked about processing 60 cases a month." Given the demands of the ALJ position in SSA, it would be reasonable that demonstrated ability to manage a large docket should be a selection factor for the position. SSA is also implementing an electronic system to handle its disability cases, which account for the bulk of its hearings workload. This new method of doing work makes additional skills necessary.

OPM has resisted suggestions to establish specific qualifications for different types of ALJs, from a belief that qualified

candidates should be able to quickly learn specific agency-related subject matter. OPM also argues that it is in the government's interest to have a mobile workforce of ALJs. It can be argued, however, that it is not a question of subject matter, but of skill and ability to perform work in a different manner. In view of the fact that SSA employs more than 4 out of 5 ALJs and pays a proportional share of the costs of the selection process, it should have a process that identifies candidates that meet its unique needs.

Congressional Action is Needed

Congress must weigh the alternatives that will improve the selection process and take steps to remedy the procedures.

The public has an interest in an efficient hearing process, with a professional staff that can provide high quality service in a timely manner. The public also has an interest in a hearing process that is demonstrably fair, and the current ALJ selection process protects that interest by having OPM manage that process. The current arrangement, however, has not met the needs of an efficient hearing process over the last several years. We recommend that the Congress weigh alternatives that can achieve the public's interest in fairness but will also satisfy its interest in efficiency and timeliness.

There are at least three options that the Congress could consider:

- Separate OPM register:

SSA would have greater input into the selection criteria to better meet its unique needs.

OPM could work with SSA, using data on quality and quantity of decisions of current SSA ALJs, to identify characteristics of judges with high quantity and quality of work and develop a separate selection process for SSA that uses those characteristics. The selection process would continue to be managed by OPM, but it would maintain a separate register of candidates for SSA.

- Single register with supplemental qualifications data:

Giving SSA a larger number of candidates to select from and more information about them would improve the agency's ability to meet its needs.

OPM could continue to maintain a single register of qualified candidates but provide SSA with a greatly expanded certificate of qualified candidates, together with supplementary information on the candidates' demonstrated ability to manage a large docket that SSA could use in making selections and about other qualifications that SSA determines necessary to fulfilling the requirements that are unique to SSA. It has been argued that the

intent of the APA was to have the Civil Service Commission (since succeeded by OPM) establish qualifying requirements and have the agency select from among all applicants meeting those requirements.[2]

- Transfer management of selection process to SSA:

SSA would be able to establish specific qualification criteria and would conduct its own selection process

SSA could be given authority to conduct its own merit selection process, including suitability and background checks, to meet its own unique needs in a timely manner. Current regulations already require agencies to conduct a job analysis to identify: the duties and responsibilities of positions; the knowledge, skills, and abilities needed to perform those duties and responsibilities; and the factors that are important in evaluating candidates. The regulations also require equal employment opportunity and provide for appeal, complaint, and grievance procedures. SSA has competent human resources professionals who are experienced in managing selection processes in a timely manner. Allowing SSA to conduct its own selection process would enable SSA to establish criteria that give credit for experience with its particular workloads. Doing so would help it make the most of its human capital and open new career paths for professionals working in its hearing function.

Recommendation

Congress needs to review the recruitment and hiring process and make the necessary changes that assure SSA's ability to hire well-qualified staff in a timely manner.

The decisional independence of ALJs that is safeguarded by the APA is an important element in the American people's confidence in SSA's programs. Those programs must be demonstrably fair. Decisions must be free from bias and from any pressures that might seek to influence the decision.

Whichever course is taken in the future regarding the selection process, there are other safeguards that provide protection to decisional independence. ALJs receive what is, in effect, a life appointment. They may be removed only for cause after a formal adjudicatory hearing by the Merit Systems Protection Board. Their compensation is, and would continue to be, determined by OPM, not SSA. Cases must be assigned in rotation, to the extent feasible. ALJs may not be assigned tasks inconsistent with their duties as an ALJ. No one, including the employing agency, may approach an ALJ regarding the facts

[2] Antonin Scalia, "The ALJ Fiasco – A Reprise," 47 *University of Chicago Law Review*, 57 (1980).

at issue in a particular case, except on the record. And ALJs may not be supervised by anyone who has investigative or prosecuting functions for the agency.

It has been eight years after the Merit Systems Protection Board first shut down the process of hiring ALJs and four years since the issues then raised were settled by a circuit court decision. The fact that a new ALJ register has not yet been established in and of itself raises questions about whether the ALJ recruitment process, as currently constituted, serves the best interests of the Social Security program and the public who look to that program for adjudication that is both impartial and efficient.

We recommend that Congress carefully review the current recruitment process. That review should address:

- resolution of whatever issues may be preventing the timely establishment of a new register,
- correcting any problems that might cause a recurrence, and
- making whatever changes

are needed to assure that the Social Security Administration is able to hire administrative law judges who have the independence to make unbiased judgments but who also have the best qualifications to carry out the important work of conducting hearings both accurately and efficiently.

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