Statement of Sylvester J. Schieber, Chairman
Social Security Advisory Board
To the
Subcommittee on Social Security of the
Committee on Ways and Means
U.S. House of Representatives
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Chairman McNulty, Mr. Johnson, Members of the Subcommittee. I am pleased to have this opportunity to appear on behalf of the Social Security Advisory Board to present the Board's view on the performance of the Social Security Administration's hearings offices.

In February 2007 I appeared before the Subcommittee to present the Social Security Advisory Board's perspectives on the causes and possible remedies for the lengthy and sometimes unconscionable delays disability applicants face in the processing of their claims. Press articles about the sky-rocketing hearings backlogs were appearing across the country; members of Congress were flooded with letters from constituents looking for relief. In the 18 months or so since then, the Social Security Administration has put into place a series of short-term initiatives designed to stop the growth in the backlog -- initiatives that should provide the agency some breathing room while they develop and implement new electronic tools, simplify and unify program policies, and expand adjudicatory capacity.

The hearings process is complex and improving the performance of hearing offices is equally complex. But to truly effect change in productivity and increase efficiency in the performance of the hearings offices, we must first understand the barriers the agency must overcome before we can propose solutions.

Administrative Procedures Act: Balancing Public Interest and Decisional Independence

However, as this Subcommittee has noted, the public deserves timely and high quality disability decisions, but currently the agency must walk a fine line in its effort to manage personnel and process.

Much of the context in which the hearing offices operate is established by the 1946 Administrative Procedures Act (APA) which created the position of administrative law judge (ALJ), as well as a number of protections to ensure their independence. ALJs receive what is, in effect, a lifetime appointment. They may be removed only for cause after a formal adjudicatory hearing by the Merit Systems Protection Board. No one, including the employing agency, may approach an ALJ regarding the facts at issue in a particular case, except on the record. And, unlike almost all other Federal executive

branch employees, ALJs are excluded by the Administrative Procedures Act from the civil service performance appraisal system. In addition, they are exempt from the standard requirement that new competitive service employees serve a probationary period.

There is no doubt that administrative law judges must have the independence to make decisions that are 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. But that independence must be balanced with the public's interests and expectations.

I have done a statistical analysis of the outcomes of hearings in fiscal year 2006 to see if the data told a story, and they did. I want to caution that this analysis does not go as far as I would like but it is indicative of the issues that I believe are important. The limitations in what I have done so far are that my analysis focuses on the full duration of the fiscal year but I did not have available information on the amount of time individual ALJs actually had in service during the year. Because of illness, other leave taken, retirements and the like, not all judges worked throughout the whole year. Still, some of my results raise important concerns in my mind.

When I arrayed administrative law judges by the number of cases they disposed of in 2006 and by the outcome of those cases, I saw several things. First of all the range of cases handled and the range of allowance rates were both very wide. About a quarter of all judges disposed of fewer than 360 cases and 14 percent disposed of fewer than 240 cases. Half the ALJs disposed of between 30 and 50 cases a month during 2006 and the average for all ALJs was between 400 and 500 cases per year. And the spread also extends on the upper side with about 10 percent of ALJs handling more than 720 cases in 2006. There are some ALJs who rendered decisions at incredible rates of 1000, 1800, and even 2500.

I should note that the agency has attempted to address the situation of judges who were hearing few cases in the past by letting judges know that they want them to attempt to process up to 500 cases per year. One of the most important elements of management in any organization is setting out expectations for workers.

In terms of my analysis of what was happening in 2006, I found that the average allowance rate of all cases disposed of was about 60 percent and that is about the average for ALJs who handled 400 to 600 cases that year. Averages, however, hide the real questions about the decision making process behind them. Among judges who heard between 240 and 720 cases in 2006, the allowance rates varied from 3 percent to 99 percent. Among these judges who handled most of the caseload in 2006, 1.25 percent allowed less than 20 percent of the cases they ruled on in 2006 and 7 percent allowed

more than 80 percent of their cases. I cannot believe that either the low or high allowance rates noted here are appropriate.

But judges who handle many more cases than the average tend to have significantly higher allowance rates, nearly 20 percentage points higher in the cases of those judges who dispose of more than 1000 cases per year. The raw statistics here cry out for more scrutiny regarding how cases are being handled across the organization.

I know that there are many anecdotal reasons advanced that purport to explain apparently anomalous numbers. But, this program is too important both to the taxpayer and to the affected individuals to dismiss statistical evidence with offhand theoretical arguments. There are administrative law judges who are deciding upwards of 1000 cases with allowance rates in the mid to high 90s. And there are administrative law judges who are deciding upwards of 1000 cases with allowance rates in the mid to low 30s. This is not a penny-ante poker game where we can shrug "Them's the breaks."

There is more in play here than decisional independence. If wrong decisions are being made then we are either depriving disabled individuals of vital income support and health insurance or we are improperly imposing on taxpayers a major cost that has been estimated to have a present value of about a quarter of a million dollars per case. And the numbers I see make it look very much like we are doing both to a completely unacceptable degree.

It is possible, with an appropriate statutory change, to reconcile the interests of the public to receive an independent decision with a process that is consistent and efficient. But this process must have three key features: clear performance expectations, accurate and timely performance measures, and incentives that encourage the judges to reach the performance expectations.

Achieving the bold strokes of this new system will be very difficult given the need to walk the fine line required by the APA. Multi-dimensional performance measures are required to capture decisional accuracy and provide useful feedback on less quantitative aspects of performance such as judicial comportment and demeanor. However, such a system is precluded under the APA. We therefore recommend that Congress consider changing the law to permit better performance measurement while also protecting the ALJs' decisional independence. A key feature of a new law would be well-defined performance criteria set in advance so all parties know what it being expected of them.

In any large organization there are always the exceptional cases of "bad actors," who, despite counseling, engage in inappropriate or illegal behavior. Discipline is an option, but under the APA, action may only be taken with the prior approval of the Merit Systems Protection Board. We have been told by SSA that it can easily take a year from the time an MSPB hearing is requested until a decision is made. That initial decision can

then be taken to the full Board, which takes another nine to twelve months. The disciplinary system should be changed to allow for a quicker response.

The Unique Role of SSA's Administrative Law Judges

SSA needs to have a skilled ALJ corps that is capable of managing a 500 case docket that involves the application of a large number of very complicated policy rules. This need runs counter to the OPM argument that it is in the government's best interest to have a mobile workforce of ALJs, individuals who can learn the laws and regulations of any agency and perform with equal competence wherever they are placed.

While administrative law judges are employed at 24 Cabinet-level and independent agencies, SSA employs the great majority. As of March 2008, 1,317 ALJs were employed by the Federal government, of whom 1,066, or 81 percent of the total, worked for SSA. Like other agencies hiring ALJs, SSA reimburses OPM for its cost of administering the selection process in proportion to its share of the number of ALJs on duty. In SSA's case, it is about $1 million per year.

SSA's interest is not just a question of subject matter expertise, but of organizational and management skills to perform a significantly higher volume of work than is required in other agency settings. It is the 500+ caseloads of SSA ALJs that distinguishes their work from that done by ALJs at regulatory agencies, such as the Securities and Exchange Commission or the Federal Communications Commission, which often have much smaller caseloads. Beyond managing high caseloads, SSA ALJs are required to develop the record, represent the interests of the government and actively ensure that claimants understand the rules and their options.

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. We would argue that this is a key to improving hearing office performance.

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 SSA register: 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 and separate register for SSA that uses those characteristics.

- Single register with supplemental qualifications data: 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 and other qualifications that SSA identifies as essential for productive judges.

- Transfer management of selection process to SSA: SSA could be given authority to conduct its own merit selection process, including suitability and background checks, to meet its needs in a timely manner. Current regulations already require agencies to conduct a job analysis to identify the knowledge, skills, and abilities needed for successful employees as well as to establish the factors used in the evaluation of candidates. SSA has competent human resources professionals who are experienced in managing selection processes in a timely manner.

Hearing Office Staffing

Changing the ALJ recruitment process, hiring more judges, and strengthening the agency's ability to set performance expectations addresses only part of the challenges relative to improving the hearing process. As we have talked to staff throughout the Office of Disability Adjudication and Review (ODAR) what has become abundantly clear is that hearing office productivity has, in the end, become constrained by a lack of support personnel to organize the cases, locate old paper folders, develop new evidence, schedule medical and vocational experts, and write decisions. In 2007, there were 4.1 support staff for every ALJ; this has increased slightly to a 4.4 to 1 ratio. Maintaining sufficient levels of staff has been exacerbated by the loss of over 500 support personnel in the last two years through regular and "early out" retirement.

When ODAR was in a paper folder environment with few automated tools, we were told that the staffing ratio of support staff to ALJs should be in the 5:1 range. As they gain more experience with electronic case processing tools and eventually fold in electronic case pulling and scheduling of experts, some efficiencies should be realized. But whether or not the current ratio of 4.4:1 or some other mix is the right one, remains to be seen. We are concerned that there is not sufficient analysis going on to determine the proper staffing ratios. Moreover, now is the time to conduct in-depth analysis to determine what these jobs should look like in the future and what will be the skills sets needed for a successful employee.

While the issue of staff ratios is critical in planning stable operations we must be careful that it does not mask the fact that ODAR is falling behind in its workload and is not even close to being a stable operation. This suggests in the short run that staffing and investment in technology may need to be greater than currently planned in order to catch up.

Demands Placed on the Hearing Office Chief Judge

When the Board was conducting its research for our 2006 report on improving the hearings process, we looked very closely at how the individual hearings offices were

managed; and specifically at the duties and responsibilities of the hearing office chief administrative law judge (HOCALJ), the senior official charged with overall responsibility for managing the office. The first duty listed in the official position description for the hearing office chief has to do with the responsibility for holding hearings. The second addresses the chief judge's responsibility for the overall management of the workload within the hearing office. Now, this strikes me as being a bit backward, but given this emphasis, it was not a surprise to learn that most hearing office chief judges carry full caseloads, upwards of 500 cases. In fact, they are the only management officials in the agency who are specifically charged with in-line production responsibilities. One cannot help but wonder how these individuals can effectively manage a complex organization while juggling a full caseload.

Do not get me wrong on the point I am making here. I believe that working managers are highly desirable in many in-line management positions. They often understand the nature of the work and problems associated with it better than full-time managers. I am simply saying that full case-load obligations and line-management responsibilities together may result in undesirable handling of all aspects of the assignment.

Although, on paper, the hearing office chief has managerial responsibility for all staff, in practice there are two parallel management structures. There is one chain for the administrative law judges and supervisory staff attorney who report directly to the HOCALJ and there is another one for the non-attorney staff who report directly to the hearing office director. The office director, in turn, reports to the HOCALJ. In theory, this should work. But instead what we see is administrative and procedural guidance flowing through the organizational stovepipes. The lines of authority and communication can be confusing and at times, at cross purposes. For example, support staff often receives directions from the judges that may be at odds with the guidance received from their line supervisor. Perhaps these two structures make sense in this blended environment of attorneys and non-attorneys; however, it seems to contribute to a lack of clarity about lines of authority, dilutes accountability, and ultimately affects office performance. The current structure demands an extraordinary level of effort and a strong commitment to communicating across the divide in order to make it work.

It is crucial that competent leadership be in place in every hearing office, but the current process has too many disincentives to attract talented managers. There are a limited number of qualified individuals willing to take on these additional tasks. Turnover is high and "burn out" is not uncommon. One way to improve and make hearing offices more efficient is to improve the quality, attraction and retention of the principal leaders in the hearing office. At a minimum, the position description for the HOCALJ should emphasize that management responsibilities are first and foremost, including responsibility for ensuring that office and agency performance standards are met, initiating disciplinary actions, and counseling underperformers.

One other aspect of the HOCALJ position deserves consideration. The hearing office chief judge is not only expected to "manage" the resources under his or her domain but to carry a full case load as noted earlier. But the individuals who take on this added burden and responsibility are paid exactly the same as the other regular line judges. You might wonder why anyone would sign up for such a role if there is no added reward for doing so. Well, there is a reward of sorts. HOCALJs can apply for vacancies elsewhere around the country when positions come open and will be moved if they are selected to head up another office. It seems some judges are willing to take on this assignment because it is a way to get moved to other geographical locations that they find more attractive for personal reasons. I am not saying that a judge signing up to be a HOCALJ to increase the prospect of relocation is necessarily bad in many cases, but it strikes me as a peculiar way to compensate people for providing a valuable and necessary service to the agency and the program.

Compensation for the HOCALJs should be adjusted to reflect that they indeed do have the responsibility for assuring that the work of the office is accomplished and that they will be held accountable for its performance. Nevertheless, we recommend that the HOCALJs carry an ongoing caseload to be sure that they are current with policies, so they can provide programmatic guidance to their ALJs and staff attorneys and so they can provide regular feedback to central management on the performance of the operational system of which they are a part.

The Road Ahead

SSA has made tremendous strides in moving its work into an electronic environment. The challenge is that most of this work is piecemeal and lacks an overarching vision to facilitate coordination across the projects and to provide a guide for setting priorities.

Over the past four years they have automated the field office disability interview, provided channels for medical providers to submit evidence electronically, and created an electronic claims folder. Electronic cases now comprise over three-quarters of ODAR's workload and they are working diligently to finish the paper cases still in the pipeline.

The success of the agency's plan to reduce the hearings backlog and prevent its recurrence is highly dependent on the successful implementation and rollout of a series of streamlined and automated case tasks. This past June electronic file assembly (ePulling) was implemented in Tupelo, Mississippi and early feedback has been positive; in July a pilot to permit claimant representatives access to the electronic folder was initiated; and work continues on software that will enable the electronic scheduling of experts, hearing locations, and ALJ availability.

While each of these accomplishments taken individually represents an important achievement, their cumulative effect may be far less than what could have been possible

given the resources that have been used. The lack of a unifying vision inhibits the administration's ability to identify and set developmental priorities. For example, achieving a specific task using COBOL may have short term gains but in the long run it runs counter to the agency's need to move toward more modern programming languages.

High performance requires a forward-looking and creative vision of a business process that is efficient, fosters consistent application of program policy, and is agency wide. In particular the agency needs to ensure that the decisions made to improve the hearings and appeals process are consistent with the decisions being made for the disability program as a whole.

Even with a unifying vision managing this improvement process will be hampered by the lack of meaningful performance measures. The agency needs to be able to measure the productivity and accuracy gains resulting from these new systems. This requires the ability to measure consistently performance with and without the change. Furthermore, detailed information about staffing and resource requirements for each new system is needed in order to determine what will be required to take them to scale within the agency.

Performance measurement must move away from focusing solely on decisional accuracy. Quality assurance must go beyond merely fulfilling Congressional requirements to check 50 percent of all DDS allowance determinations, but must inform the analysis of proposed legislation, program implementation and shape policy research activities. Moreover, quality management must become part of the fabric of the organization. It must be reflected in the agency's strategic plan, in its culture, and its day-to-day business.

Throughout the Board's existence, we have spent the vast majority of our time studying the disability program and how well it serves the public. In our 1999 report on how SSA can improve service to the public, we noted that SSA needed to improve the way it measures performance. This is an agency that collects a wealth of data on case characteristics, decisional outcomes, timeliness, productivity, quality, and cost. The data are tallied and put into charts and called "management information." I am not convinced that much of this is nearly as helpful as it might be. I believe that many modern organizations confuse data for information. They are not the same.

Part of the problem may be that data itself is often of little value if not refined into information and knowledge that managers on the ground can use to improve the efficiency of the units they run. For example, a raw statistic that shows that a particular ALJ may be extremely productive in terms of disposing of cases provides little value if it hides the fact that the individual's productivity is correlated (and possibly responsible) for low productivity of other ALJ's in the same unit. Statistics on gross dispositions may be misleading if they are not highly correlated with net dispositions after remands. Data on individual ALJ productivity can only be properly assessed in an analysis that controls

for other environmental variables -- number and characteristics of support staff, characteristics of cases being assessed, percentage of decisions being remanded and other variables that affect work flows.

SSA has the technology in place to provide it with the opportunity for immediate creation and retrieval of information, yet it seems there is little innovative analysis occurring. Strengthening management's ability to effect change is through the identification of and targeting the root causes of bottlenecks and vulnerable processes and then implementing performance measures that track outcomes. We recommend that SSA invest in better management information systems that provide a basis for concrete steps for process improvement within a unified vision for a high performing organization.

The Social Security Administration is at a crossroad in its ability to continue to fulfill the mission that was set out for it in 1935. Granted, the mission has grown and the scope of the agency's responsibilities undoubtedly far exceeds what the original framers had in mind. The SSA has always stepped up to meet every new challenge and they can do it again. But it takes adequate resources and investment in its staff. Chronic under-funding has contributed to the current crisis and has diverted the agency's attention away from long-term planning. Short term initiatives must be linked to a longer range vision for the future that, together, make a compelling case for sufficient and stable funding. SSA has massive administrative challenges ahead and while there is no magic bullet, much can be accomplished through the appropriate adaptation of technology, recruiting and retaining highly skilled staff, and instituting performance measures that ensure timely and equitable hearings is a step in the right direction.

Mr. Chairman, I hope these comments are helpful to the Subcommittee as it examines SSA's management of its hearing offices. I would be happy to provide any additional assistance you may want, and I would be happy to answer any questions you may have.