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Subcommittee on Social Security

The Social Security Disability Appeals Process

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National Organization of Social Security Claimants' Representatives
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TESTIMONY OF ETHEL ZELENSKE ON BEHALF OF THE SOCIAL SECURITY TASK FORCE, CONSORTIUM FOR CITIZENS WITH DISABILITIES

Chairman Johnson, Ranking Member Becerra, and Members of the Subcommittee, thank you for the opportunity to provide testimony for this hearing on the Social Security disability appeals process.

I am the Director of Government Affairs for the National Organization of Social Security Claimants' Representatives (NOSSCR). I also am a Co-Chair of the Consortium for Citizens with Disabilities (CCD) Social Security Task Force. CCD is a working coalition of national consumer, advocacy, provider, and professional organizations working together with and on behalf of the 54 million children and adults with disabilities and their families living in the United States. The CCD Social Security Task Force focuses on disability policy issues in the Title II disability programs and the Title XVI Supplemental Security Income (SSI) program.

The focus of this hearing is extremely important to people with disabilities. Title II and SSI cash benefits, along with the related Medicaid and Medicare benefits, are the means of survival for millions of individuals with severe disabilities. They rely on the Social Security Administration (SSA) to promptly and fairly adjudicate their applications for disability benefits.

As the backlogs in disability claims have grown over the years, people with severe disabilities have been bearing the brunt of the delays. Behind the numbers are individuals with disabilities whose lives have unraveled while waiting for decisions – families are torn apart; homes are lost; medical conditions deteriorate; once stable financial security crumbles; and many individuals die.

Title II disability benefits are modest and do not present a strong disincentive to work: Benefits average about $1,100 per month, which is less than a minimum-wage job. Yet, the benefits help to keep tens of thousands of people with disabilities and their families out of poverty and from being destitute and homeless. The majority of Social Security Disability Insurance (SSDI) beneficiaries tend to be older. In 2010, about 70% were age 50 or older and about 30% were age 60 or older. The majority also have low educational attainment. Two-thirds of beneficiaries have only a high school or less education and about one-third did not finish high school. About 45% of SSDI beneficiaries qualified based on age-related impairments, which are likely to worsen rather than improve over time.

Demographic factors have been the primary factor for the increase in applications for disability benefits such as the baby boomers reaching their "peak disability years" and more women in the workforce who are now insured for benefits. As a result of the increase in applications, SSA finds itself at a critical crossroads. The wave of new claims is having a very significant impact at the state Disability Determination Services (DDSs) where processing times are on the rise.

The news has been more positive at the hearing level where processing times have been significantly reduced. The average processing time at the hearing level was at a record high of 532 days in August 2008. In May 2012, the average processing time had dropped to 353 days – a reduction of nearly 6 months. Commissioner Astrue has set a goal of 270 days by the end of FY 2013. However, we are deeply concerned that any progress in eliminating the hearings level backlog and reducing the average processing time will be delayed due to a lack of adequate resources, thus putting the Agency's 2013 goal and other critical workload benchmarks at risk.

SSA'S NEED FOR ADEQUATE RESOURCES

For many years, SSA did not receive adequate funds to provide its mandated services. Between FY 2000 and FY 2007, the resulting administrative funding shortfall was more than $4 billion. The dramatic increase in the hearing level disability claims backlog coincided with this period of significant underfunding.

We want to thank the Subcommittee for its efforts to provide SSA with adequate funding for its administrative budget. Between 2008 and 2010, Congress provided SSA with the necessary resources to start meeting its service delivery needs. With this funding, SSA was able to hire thousands of needed new employees, including additional Administrative Law Judges (ALJs) and hearing level support staff. There can be no doubt that this additional staff led to SSA's ability to make the dramatic progress in reducing the hearings level backlog.

Unfortunately, that trend did not continue and the recent reduction in funding threatens to undo all of the progress SSA has made. SSA has received virtually no increase in its Limitation on Administrative Expenses (LAE) since 2010. In FY 2011, SSA's appropriation was a small decrease from the FY 2010 level and the FY 2012 appropriation was only slightly above the FY 2010 level.

The budget shortfall has already impacted the Agency, which in turn affects the public, including people with disabilities. The current funding situation has led to a number of actions by SSA including: continuation of the hiring freeze (except for the hearing level) that began in July 2010; delaying the opening of 8 new hearing offices; closing 160 temporary remote hearing sites that serviced claimants in communities distant from permanent hearing sites; diverting resources from information technology projects that would have improved productivity in the future; and closing field offices to the public 30 minutes early each day. By the end of this year, SSA will have lost 9,000 employees in three years.

A concrete example of the budget shortfall's impact on claimants at the hearing level is SSA's decision to close 160 temporary remote hearing sites. Although "temporary," many had been used for years, if not decades. My organization received passionate complaints from our members about the serious difficulties and hardships that claimants now face with the closure of these sites. In most of these locations, there is no public transportation to the nearest ODAR hearing office. Many of the claimants are unable to sit for a long car ride. Many do not drive and cannot find someone to drive them. Also, there has been conflicting and confusing information about the availability of travel reimbursement.

The reduction in staffing at the field office and DDS levels will certainly impact the workload at the hearing level. Disability claims may be less developed, leading to incorrect decisions earlier in the process and more appeals. We are very concerned that the significant progress made in reducing hearing processing times and the disability claims backlog will be stymied due to the lack of needed resources. At a Senate Finance Committee hearing in May 2012, Commissioner Astrue noted that "progress on backlog reduction [at the hearing level] has slowed in the last year …."[1]

We support the President's FY 2013 Budget request of $11.76 billion for the Social Security Administration. This is the minimum amount needed to continue to reduce key backlogs and increase deficit-reducing program integrity work and is only a very modest increase over the $11.46 billion

[1] "The Social Security Administration: Is it Meeting its Responsibilities to Save Taxpayer Dollars and Serve the Public?," Hearing before the United States Senate Committee on Finance, May 17, 2012, Statement of Michael J. Astrue, Commissioner, Social Security Administration. Available at http://www.finance.senate.gov/imo/media/doc/SSA-%20Testimony-%20Astrue-FINAL.pdf.

appropriated in FY 2012. With this level of funding, SSA could continue to build on the progress achieved thus far, progress that is vital to millions of people who depend on their services, including people with disabilities. We strongly urge Congress to provide SSA with sufficient administrative funding so that there are enough personnel in the SSA field office, the DDSs, and the hearing offices, to adequately process, develop, and determine disability claims in a timely manner. This funding level will allow SSA to continue working down disability backlogs, to implement efficiencies in its programs, and to increase program integrity work.

THE DISABILITY APPEALS PROCESS

An Informal and Nonadversarial Process

The longstanding view of Congress, the United States Supreme Court, and SSA is that the Social Security disability claims process is informal and nonadversarial, with SSA's underlying role to be one of determining disability and paying benefits. "In making a determination or decision in your case, we [SSA] conduct the administrative review process in an informal, nonadversary manner."[2] SSA's interpretation is consistent with United States Supreme Court decisions over the last thirty years that discuss Congressional intent regarding the SSA hearings process. Most recently in 2000, the Supreme Court stated:

> The differences between courts and agencies are nowhere more pronounced than in Social Security proceedings. Although many agency systems of adjudication are based to a significant extent on the judicial model of decision-making, the SSA is perhaps the best example of an agency that is not ... Social Security proceedings are inquisitorial rather than adversarial. It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits….[3]

The Supreme Court relied on another decision that was then nearly 30 years old, emphasizing Congress' intent to keep the process informal and nonadversarial:

> There emerges an emphasis upon the informal rather than the formal. This, we think, is as it should be, for this administrative procedure and these hearings should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone and operation. This is the obvious intent of Congress so long as the procedures are fundamentally fair.[4]

The value of keeping the process informal should not be underestimated. It encourages individuals to supply information, often regarding the most private aspects of their lives. The emphasis on informality also has kept the process understandable to the layperson and not strict in tone or operation.

The process should not be adversarial. Proponents of making the process adversarial by having SSA represented at the ALJ hearing believe that the Agency is not fairly represented in the disability determination process. It is important to note that SSA and the claimant are not parties on opposite sides of a legal dispute. Further, SSA already plays a considerable role in setting the criteria and procedures for determining disability, which the claimant must follow.

The issue of having SSA represented at the ALJ hearing was raised at a July 2011 House hearing held by this Subcommittee and the House Judiciary Subcommittee on Courts, Commercial and Administrative

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[2] 20 C.F.R. § 404.900(b), 416.1400(b).
[3] *Sims v. Apfel*, 530 U.S. 103, 110 (2000)(citations omitted).
[4] *Richardson v. Perales,* 402 U.S. 389, 400-401 (1971).

Law.[5] Agreeing with Commissioner Astrue's testimony at that hearing, we do not support proposals to have SSA represented at the ALJ hearing.

SSA previously tested, and abandoned, a pilot project in the 1980s to have the agency represented – the Government Representation Project (GRP). First proposed by SSA in 1980, the plan encountered a hostile reception at public hearings and from Members of Congress and was withdrawn. The plan was revived in 1982 with no public hearings and was instituted as a one-year "experiment" at five hearing sites. The one-year experiment was terminated more than four years later following Congressional criticism and judicial intervention.[6]

Based on the stated goals of the GRP experiment, i.e., assisting in better decision-making and reducing delays, it was a failure. Congress found that: (1) processing times were lengthened; (2) the quality of decision-making did not improve; (3) cases were not better prepared; and (4) the government representatives generally acted in adversarial roles. In the end, the GRP experiment did nothing to enhance the integrity of the administrative process. The GRP caused extensive delays in a system that was overburdened, even then, and injected an inappropriate level of formality, technicality, and adversarial process into a system meant to be informal and nonadversarial.

In addition to radically changing the nature of the process, the financial costs of representing the agency at the hearing level would be very high. In 1986, SSA testified in Congress that the cost was $1 million per year for only five hearings offices in the Project (there currently are more than 140 hearing offices).

The Important Role of the Administrative Law Judge

ALJs and their decisional independence play a critical role in protecting the rights of claimants. A claimant's right to a *de novo* hearing before an ALJ is central to the fairness of the SSA adjudication process. This right guarantees that individuals with disabilities have a full and fair administrative hearing by an independent decision-maker who provides impartial fact-finding and adjudication, free from agency coercion or influence. The ALJ questions and takes testimony from the claimant and other witnesses, and considers and weighs the evidence, all in accordance with relevant law and agency policy. For claimants, a fundamental principle of this right is the opportunity to present new evidence to the ALJ, testify in person before the ALJ, and receive a decision based on all available evidence.

Recently, the SSA ALJ corps has come under increased scrutiny. It is important to emphasize that the vast majority of the more than 1400 SSA ALJs perform their jobs consistent with the Social Security Act, SSA regulations and policy, and conduct themselves in a professional and judicially appropriate manner. Key points to recognize include the following:

- Allowances at the ALJ level account for only a small percentage of overall allowances, less than 25%. The overwhelming majority of favorable disability determinations are made by DDSs at the initial and reconsideration levels.

- Despite the increase in the number of disability applications and appeals to the hearing level, the overall ALJ allowance rate has been dropping and is at the lowest level in many years. In FY 2011, the ALJ

[5] Joint Oversight Hearing on the Role of Social Security Administrative Law Judges, July 11, 2011, http://waysandmeans.house.gov/Calendar/EventSingle.aspx?EventID=249734.

[6] In *Sallings v. Bowen*, 641 F. Supp. 1046 (W.D.Va. 1986), the federal district court held that the Project was unconstitutional and violated the Social Security Act. In July 1986, it issued an injunction prohibiting SSA from holding further proceedings under the Project.

allowance rate was 58%, four percentage points lower than in FY 2010. SSA statistics show that most ALJs fall within close range of the average.

- There are a number of reasons why ALJs reverse DDS disability determinations. By law, ALJ hearings are *de novo* and the ALJ is not bound by previous determinations. Claims are often better developed at the hearing level, in part due to the fact that claimants are represented and the representative is able to obtain more specific medical evidence tailored to the SSA disability criteria. In addition, claimants' conditions change and deteriorate with the passage of time. Also, ALJs are able to call expert witnesses – medical experts and vocational experts – to provide hearing testimony on complex issues and who can better explain the claimant's impairment(s), treatment, how functional limitations affect the ability to work, etc. And a critical difference from the earlier levels is that the ALJ hearing is the first opportunity for the claimant to meet the adjudicator face-to-face, which can be especially important in cases involving nonexertional impairments such as mental illness and pain.

- ALJ decisions are reviewed by SSA in a manner consistent with law. While ALJs have decisional independence, they must follow SSA law and policies. SSA has implemented a quality review process for ALJ decisions. In FY 2011, the SSA Office of Disability Adjudication and Review (ODAR) established a Quality Review (QR) initiative and opened four new Branches in the Office of Appellate Operations. The QR Branches review a computer-generated sample of unappealed favorable ALJ decisions (almost 3700 in FY 2011) before they are effectuated. Cases are then referred to the Appeals Council for possible review. If the Appeals Council accepts review, it can remand or issue "corrective" decisions, which may involve changing the favorable ALJ decision to a "partially" favorable decision or to an unfavorable decision. There also is some post-effectuation review of ALJ decisions. While these ALJ decisions cannot be changed, post-effectuation review looks for policy compliance and can focus on cases where there is a recurring problem and on specific situations. Policy guidance can then be provided.

RECENT IMPROVEMENTS AT THE HEARINGS AND APPEALS LEVELS

To address the hearing level backlog, Commissioner Astrue has implemented a number of initiatives, which we believe have improved the appeals process for all parties involved: claimants, their representatives, and SSA.

Caution Regarding the Search for Efficiencies. While we generally support the goal of achieving increased efficiency throughout the adjudicatory process, we caution that limits must be placed on the goal of administrative efficiency for efficiency's sake alone. The purposes of the Social Security and SSI programs are to provide cash benefits to those who need them and have earned them and who meet the eligibility criteria. While there may be ways to improve the decision-making process from the perspective of the adjudicators, the critical measure for assessing initiatives for achieving administrative efficiencies must be how they affect the very claimants and beneficiaries for whom the system exists.

Technological Improvements

Commissioner Astrue has made a strong commitment to improve and expand the technology used in the disability determination process. CCD generally supports these efforts to improve the disability claims process, so long as they do not infringe on claimants' rights. SSA has implemented a number of significant technological improvements that have helped claimants and their representatives and have made the process more efficient for SSA employees. Some of these improvements include the following:

1. Submitting evidence electronically. Under Electronic Records Express (ERE), registered claimants' representatives are able to submit evidence electronically through an SSA secure website or to a dedicated

fax number, using a unique barcode assigned to the claim. Evidence submitted through ERE is automatically "placed" in the claimant's electronic disability claims folder. As a result, submitted evidence is in the claimant's file sooner and is almost never lost or misplaced.

2. Online access to claimants' electronic folders. SSA has implemented the Appointed Representative Suite of Services (ARSS) that provides direct access to a claimant's electronic folder for authorized representatives. To have access, the appointed representative must go through a strict enrollment and authentication process. Once authorized, the representative has access to view and download the claims file at the hearings and Appeals Council levels. As a result, hearing office staff and Appeals Council staff do not need to copy the claims file for the representative. SSA has recently expanded ARSS to allow access to the hearing level status report, which allows an authorized representative to view the status of a specific claimant's case at the hearing office, without the need to contact hearing office staff. ARSS is a very significant improvement that has led to concrete efficiencies for all parties.

3. Electronic appeals. Appeals can now be filed electronically when requesting reconsideration and requesting a hearing. In fact, SSA has recently made use of "iAppeals" an affirmative duty under its Rules of Conduct and Standards of Responsibility for Representatives[7] if the representative requests direct payment of fees.[8] The "mandate" requires an appointed representative to file these appeals electronically along with the associated Disability Report-Appeals (Form SSA-3441). When filed electronically, the information in the appeals form and SSA-3441 becomes data, which is used by the SSA system to screen cases for possible expedited decisions, e.g., compassionate allowances, Office of Disability Adjudication and Review (ODAR) virtual screening by senior attorneys, selection for the "informal remand project." While we had a number of questions and concerns when the requirement was first announced, SSA has been very cooperative in meeting with us and responding to issues we have raised.

4. Use of video hearings. Video hearings allow ALJs to conduct hearings without being at the same geographical site as the claimant and representative and have the potential to reduce processing times and increase productivity. We support the use of video hearings so long as the right to a full and fair hearing is adequately protected; the quality of video hearings is assured; and the claimant retains the absolute right to have an in-person hearing as provided under current regulations[9] and SSA policy.

The claimant makes the ultimate decision whether to accept the video hearing. In general, representatives report that video hearings are usually accepted, primarily because they lead to faster adjudication. However, there are a number of reasons why a claimant may decline and choose to exercise the right to an in-person hearing, e.g., the claimant's demeanor is critical (e.g., respiratory impairments, fatigue caused by impairment); the claimant has a mental impairment with symptoms of paranoia; the claimant has a hearing impairment.

Several years ago, SSA established National Hearing Centers (NHCs) to help reduce the hearings backlog. Cases are transferred from "brick and mortar" hearing offices to the five NHCs, where hearings are handled exclusively by video. If claimants exercise their right to an in-person hearing, the claim is transferred back to the geographic hearing office where a local ALJ will hear the case. However, we have recently heard that NHC ALJs, in some cases, will travel to the local hearing offices to hear cases in person.

The Representative Video Project (RVP) is another initiative that has been instituted to help reduce the disability claims backlog. Under RVP, the representative purchases video equipment that allows the claimant and representative to be in the representative's office with the ALJ in a hearing office location.

[7] 20 C.F.R. §§ 404.1740(b)(4) and 416.1540(b)(4).
[8] 77 Fed. Reg. 4653 (Jan. 31, 2012).
[9] 20 C.F.R. §§ 404.936 and 416.1436.

Some representatives and their clients who have participated in RVP have found it to be very satisfactory. However, others have been less enthusiastic due to the inability to resolve technical issues and ALJ refusal to accept use of RVP (the ALJ has the ultimate authority to decide whether to allow its use). As a result, there has been limited use of RVP, with representatives hesitant to invest in purchasing the equipment unless they know that ALJs will accept its use.

Screening Initiatives

We support SSA's efforts to accelerate decisions and develop new mechanisms for expedited eligibility throughout the application and review process, without sacrificing accuracy. We encourage the use of ongoing screening as claimants obtain more documentation to support their applications.

1. The Senior Attorney Program. This program allows senior staff attorneys in hearing offices to issue fully favorable decisions in cases that can be decided without a hearing (i.e., "on the record"). This cuts off many months in claimants' wait for payment of benefits. In FY 2011, senior attorneys decided more than 53,000 cases. In FY 2012, nearly 28,000 cases have been approved through May 2012 by senior attorneys.

2. Virtual Screening Unit. Related to the Senior Attorney Program, the Virtual Screening Unit (VSU) is made up of about 100 ODAR senior attorneys who remain in their local hearing offices and screen electronic folder cases identified by the national ODAR office for possible favorable decisions. Cases they screen may come from hearing offices throughout the country. (In contrast, senior attorney advisors in local hearing offices review cases in their own respective locations.) VSU attorneys have a limited time period to screen cases for fully favorable decisions. Claimants do not lose their place in the hearing queue if the case is returned to the ALJ.

3. Informal Remand Project. Earlier this year, ODAR announced a new Informal Remand Project. While similar to previous informal remand projects, this one is bigger in scope, involving hundreds of federal disability examiners (not DDS employees and not ODAR senior attorneys) around the country. If a case is selected for this project, the goal is to complete review within 45 days of the case transfer. Only electronic folder cases are selected according to agency profiles. Examiners can only issue fully favorable decisions. If partially favorable or unfavorable (in their opinion), the case will be returned to the hearing office. The examiner can make the fully favorable decision, based on the evidence already in the file, or with additional evidence from the representative. Like VSU cases, claimants do not lose their place in the hearing queue.

We have not yet seen statistics on the number of cases transferred and the number of cases decided favorably by the federal examiners in the Project. Representatives have reported some issues with cases that have been remanded, such as: (1) limited time to provide additional evidence, which is difficult to meet; (2) inability to access the electronic folder through ARSS while the case is in the Remand Project so that it is unknown what evidence is already in the file if the claimant is a recent client; and (3) difficulties contacting the examiner.

4. Compassionate Allowances. This initiative allows SSA to create "an extensive list of impairments that we [SSA] can allow quickly with minimal objective medical evidence that is based on clinical signs or laboratory findings or a combination of both…." In April 2012, Commissioner Astrue announced that the current list of 113 conditions will be increased to 165 conditions, effective August 13, 2012. The conditions on the list involve very serious diagnoses, for which there is unanimous agreement that the severity of the impairment meets the disability standard. The list includes cancers, neurological and immune system disorders, and other impairments affecting adults and children. Unlike the Quick

Disability Determination (QDD) screening,[10] which occurs only when an application is filed, screening for compassionate allowances can occur at any level of the administrative appeals process, including the ALJ and Appeals Council levels.

RECOMMENDATIONS FOR IMPROVING THE DISABILITY DETERMINATION PROCESS

We have numerous suggestions for improving the disability claims process for people with disabilities. We believe that these recommendations can go a long way towards reducing the disability claims backlog and making the process more efficient for all parties involved.

1. Increase the time for hearing notices. We recommend that the time for providing advance notice of the hearing date be increased from the current 20 days[11] to 75 days. We believe that this increase will allow more time to obtain medical evidence before the hearing and make it far more likely that the record will be complete when the ALJ reviews the file before the hearing. The 75-day time period has been in effect in SSA's Region I states since August 2006[12] and, based on reports from representatives, has worked well.

2. Improve development of evidence earlier in the process. We support initiatives to improve the process at the initial levels so that the correct decision can be made at the earliest point possible and unnecessary appeals can be avoided. Improvements at the front end of the process can have a significant beneficial impact on preventing the backlog and delays later in the appeals process. Inadequate case development at the DDS level means that ALJs will need to spend more time reviewing cases prior to the hearing. This leads to longer processing times at the hearing level. Our recommendations include the following:

- Provide more assistance to claimants at the application level regarding necessary and important evidence so that all impairments and sources of information are identified, including non-physician and other professional sources.
- DDS examiners should obtain necessary and relevant evidence. The DDSs generally do not use questionnaires or forms that are tailored to the specific type of impairment or ask for information that addresses the disability standard as implemented by SSA. This "language" barrier causes delays in obtaining evidence, even from supportive and well-meaning doctors.
- Electronic records, like paper records, need to be adapted to meet the needs of the SSA disability determination process. Many providers are submitting evidence electronically but these records are based on the providers' needs but often do not address the SSA disability criteria.
- Increase reimbursement rates for providers. To improve provider response to requests for records, appropriate reimbursement rates for medical records and reports need to be established. Appropriate rates should also be paid for consultative examinations and for medical experts who testify at hearings.
- Provide better explanations to medical providers. SSA and DDSs should provide better explanations to all providers, in particular to physician and non-physician treating sources, about the disability standard and ask for evidence relevant to the standard.
- Improve the quality of consultative examinations. Steps should be taken to improve the quality of the consultative examination (CE) process. There are many reports of inappropriate referrals and short perfunctory examinations. In addition, there should be more effort to have the treating physician conduct the consultative examination, as authorized by SSA's regulations.[13]

[10] See 20 C.F.R. §§ 404.1619 and 416.1019.
[11] 20 C.F.R. §§ 404.938(a) and 416.1438(a).
[12] 20 C.F.R. § 405.315(a).
[13] 20 C.F.R. § 404.1519h and 416.919h.

3. Help claimants obtain representation earlier in the process to assist with development.
Representatives play an important role in obtaining medical and other information to support their clients' disability claims and helping SSA to streamline the disability determination process. They routinely explain the process and procedures to their clients with more specificity than SSA. They obtain evidence from all medical sources, other treating professionals, school systems, previous employers, and others who can shed light on the claimant's entitlement to disability benefits. Given the importance of representation, the Social Security Act requires SSA to provide information on options for seeking legal representation, whenever the agency issues a notice of any "adverse determination."[14] In reality, this statutorily required information is rarely provided.

Most representation occurs at the hearing level. A major reason is that it is only at that level, after the request for hearing is filed, that claimants are given concrete information regarding local and national resources to contact. However, many claimants' representatives represent claimants prior to the hearing level, by helping them file their applications, obtain medical evidence in support of the application, and assist in appealing if their applications are denied. My organization recently conducted a survey of our members regarding their representation of claimants prior to the hearing level. Although a limited and non-scientific measure, more than 500 of our members responded that they do represent claimants at the initial and reconsideration levels, in addition to the hearing level.

Unfortunately, the rate of representation at the initial and reconsideration levels is extremely low when compared to the hearing level because little or no information is provided that is specific or targeted to the area where claimants live. We also receive reports that claimants are in fact actively discouraged from obtaining representation by SSA claims representatives or telephone representatives.

Given the statutory requirement, we recommend that SSA include more information on options for representation in initial and reconsideration denial notices similar to that provided at the hearing level.

OTHER ISSUES REGARDING THE HEARING AND APPEALS PROCESS

1. Keep the record open for new evidence.
Over the years, there have been frequent proposals to limit the ability to submit evidence within a set number of days before the hearing and/or to close the record entirely after the ALJ hearing is held. We believe that these proposals are neither beneficial to claimants nor administratively efficient for the Agency.

Under current law, new evidence can be submitted to an ALJ and it must be considered in reaching a decision.[15] Contrary to assertions by some that there is an unlimited ability to submit new evidence after the ALJ hearing, the current regulations and statute are very specific in limiting that ability at later levels of appeal. At the Appeals Council level, new evidence will be considered, but only if the Appeals Council determines it relates to the period before the ALJ decision and is "new and material."[16] While the Appeals Council remands a little over one-in-five appeals filed by claimants, the reason for most remands is not the submission of new evidence, but rather legal errors committed by the ALJ, including the failure to consider existing evidence according to SSA regulations and policy and the failure to apply the correct legal standards.

[14] 42 U.S.C. § 406(c); 42 U.S.C. § 1383(d)(2)(D).
[15] 42 U.S.C. § 405(b)(1). Current regulations comply with the statute by providing that the claimant may submit new evidence at the hearing. 20 C.F.R. §§ 404.929 and 416.1429.
[16] 20 C.F.R. §§ 404.970(b) and 416.1470(b).

At the federal court level, the record is closed and the court will not consider new evidence. The court does have the authority to remand the case for SSA to consider the additional evidence, but only if the new evidence is (1) "new" and (2) "material" and (3) there is "good cause" for the failure to submit it in the prior administrative proceedings.[17] Because courts hold claimants to the stringent standard in the Act, remands occur very infrequently under this part of the statute. The vast majority of court remands are not based on new evidence, but are ordered under the statute due to legal errors committed by the ALJ.

We strongly support the submission of evidence as early as possible, since it means that a correct decision can be made at the earliest point possible. However, there are many legitimate reasons why evidence is not submitted earlier and thus why closing the record is not beneficial to claimants, including: (1) worsening of the medical condition which forms the basis of the claim; (2) factors outside the claimant's control, such as medical provider delay in sending evidence; and (3) the need to keep the process informal and focused on determining whether the individual is eligible for disability benefits to which he or she is statutorily entitled.

2. Policy to keep the ALJ's identity undisclosed.

In late 2011, SSA implemented a new policy that removes the ALJ's name from the hearing notice and precludes ODAR hearing office staff from disclosing the ALJ's identity until the claimant and his/her representative enter the hearing room. We have been very concerned about the negative impact of this policy on claimants, on the ability of representatives to effectively represent claimants, and on the efficient operation of ODAR hearing offices. We have communicated our concerns to the Commissioner and look forward to working with him to find ways to address the Agency's reasons for making the policy change.

CONCLUSION

Delays in making decisions on eligibility for disability programs can have devastating effects on people already struggling with difficult situations. On behalf of people with disabilities, it is critical that SSA be given substantial and adequate funding to make disability decisions in a timely manner and to carry out its other mandated workloads. We appreciate your continued oversight of the administration of the Social Security programs and the manner in which those programs meet the needs of people with disabilities.

Submitted on behalf of:
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National Multiple Sclerosis Society
National Organization of Social Security Claimants' Representatives
Paralyzed Veterans of America
The Arc of the United States
United Spinal Association

[17] 42 U.S.C. § 405(g).