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Written Statement for the Record

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National Organization of Social Security Claimants' Representatives

Hearing on:

Rising Social Security Disability Claims and the Role of Administrative Law Judges

Subcommittee on Energy Policy, Health Care and Entitlements

House Committee on Oversight and Government Reform

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Chairman Lankford, Ranking Member Speier, and Members of the Subcommittee, thank you for the opportunity to provide testimony for this hearing on "Rising Social Security Disability Claims and the Role of Administrative Law Judges."

Social Security Disability Insurance (SSDI) provides vital economic security, as well as access to health care for individuals whose impairments are so severe that they preclude substantial, gainful work. This income support program is an integral component of our nation's Social Security system, reflecting the core American value of assisting those in need. We appreciate your interest in and attention to this critical program.

I offer testimony here today on behalf of NOSSCR, the National Organization of Social Security Claimants' Representatives. Founded in 1979, NOSSCR is a professional association of attorneys and other advocates who represent individuals seeking Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) disability benefits. NOSSCR members represent these individuals with disabilities in proceedings at all SSA administrative levels, but primarily at the hearing level, and also in federal court. NOSSCR is a national organization with a current membership of more than 4,000 members from the private and public sectors and is committed to the highest quality legal representation for claimants.

We believe that the Social Security disability program is fundamentally sound, in that it implements a strict but fair standard of disability established by statute. Individuals claiming disability benefits must prove that their severe medical impairments prevent them from performing not only the work they have done in the past, but any other work which exists in significant numbers in the economy. While no system is perfect, Social Security's administration of the disability program is not broken, and the system is not in crisis. Unfortunately, some of the proposals for change, while well-meaning, would not improve the system and, in fact, would cause real harm to deserving individuals who are unable to work and have nowhere else to turn. Some of these proposals are, in fact, based on myths which need to be exposed as such.

I. SSDI: A Vital System for People with Significant Disabilities

About 57 million, or 1 in 5 Americans, live with disabilities, and about 38 million or 1 in 10 have a severe disability.[1] The Social Security disability programs provide vital support to only those with the most significant disabilities—about 14 million children and working-age adults. Most people who apply for benefits are denied, and only about 40 percent of applicants are awarded benefits under the strict Social Security definition of disability—even after all stages of appeal.[2]

SSDI benefits are modest, averaging only about $1,129 per month in May 2013,[3] just over the Federal Poverty Level for a single person—but they play a vital role in helping people meet their basic needs. For the vast majority of beneficiaries, SSDI benefits make up at least 75 percent of income, and for nearly half of non-institutionalized beneficiaries SSDI makes up over 90 percent of income.[4] Beneficiaries report that SSDI helps them pay for essentials such as housing, utilities, food, transportation, clothing, medications, and out-of-pocket expenses for medical care. Additionally, SSDI benefits play a central role in helping people with significant disabilities live in the community, rather than in restrictive, costly institutions. SSDI benefits keep millions of people with significant disabilities from deep poverty and homelessness, and for many beneficiaries the alternatives would be unthinkable.

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[1] U.S. Census Bureau, Current Population Reports, Americans with Disabilities: 2010 (July 2012), available at http://www.census.gov/prod/2012pubs/p70-131.pdf.

[2] Ruffing, Kathy A. (2012). Social Security Disability Insurance is Vital to Workers with Severe Impairments. Washington, DC: Center on Budget and Policy Priorities.

[3] Social Security Administration, Table 2, Monthly Statistical Snapshot, Released June 2013, available at http://www.ssa.gov/policy/docs/quickfacts/stat_snapshot.
http://www.ssa.gov/policy/docs/statcomps/di_asr/2011/sect01b.html#table4.

[4] Ruffing, *supra* note 2.

SSDI is an earned benefit targeted to people with the most severe disabilities. As part of the Social Security system, SSDI is an insurance program designed to provide modest income support to Americans with significant disabilities, who have paid into the system during their working lives, as well as to their survivors and dependents. To qualify for SSDI, an individual must have worked for long enough and recently enough to have earned sufficient FICA credits to qualify.

An individual must also meet Social Security's strict disability standard, by establishing one or more medically determinable impairments that are "expected to last 12 months or result in death" and are so severe that they preclude substantial gainful activity (SGA)—defined as the inability to work and earn more than $1,040 per month for 2013)—given the individual's current circumstances. In light of these strict standards, it is unsurprising that only a small fraction of the total number of people with disabilities across the U.S. is found eligible for SSDI each year.

Diagnoses of SSDI beneficiaries cover the full range of disabilities, from significant physical and sensory disabilities, to mental disorders such as intellectual disability or schizophrenia, to sensory disorders including visual impairments and deafness, to diseases such as advanced cancers, multiple sclerosis, Huntington's disease, advanced heart disease, or early-onset Alzheimer's disease. Many beneficiaries are terminally ill. In fact, about 1 in 5 male SSDI beneficiaries and nearly 1 in 6 female SSDI beneficiaries die within the first five years of receiving benefits.[5] Furthermore, the health of many SSDI beneficiaries worsens over time. Nearly 1 in 2 beneficiaries reported in a recent National Beneficiary Survey that their health had declined over the past year.[6]

Additionally, the Social Security Act requires that a person not only must be unable to perform his or her own past work at or above SGA, but also must be unable to perform any kind of work that exists in the national economy, considering the person's age, education, and work experience. Prior to applying for SSDI, the typical claimant held an unskilled or semi-skilled job with moderate or light strength requirements.[7] The most common jobs held by SSDI claimants include jobs such as nurse assistant and home attendant, cashier, fast food worker, laborer, and construction worker.[8]

Many SSDI beneficiaries have made repeated attempts to work, often exacerbating their impairments, before finally turning to the Social Security system as a last resort. In addition, the majority of beneficiaries have a combination of adverse vocational characteristics. Nearly 70 percent of SSDI beneficiaries in 2010 were age 50 or older and nearly 1 in 3 was age 60 or older. Low educational attainment limits employment opportunities for many beneficiaries: about 67 percent of SSDI beneficiaries have a high school diploma or less (and 30 percent did not finish

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[5] *Ibid.*

[6] Livermore, G. et al. (2009). Work Activity and Use of Employment Supports Under the Original Ticket to Work Regulations: Characteristics, Employment, and Sources of Support Among Working-Age SSI and DI Beneficiaries, Final Report. http://www.ssa.gov/disabilityresearch/documents/TTW5_2_BeneChar.pdf.

[7] Social Security Administration (2010). Occupational and Medical-Vocational Claims Review Study, Preliminary Results as of August 30, 2010.

[8] *Ibid.*

high school). As discussed above, many have acquired few if any skills in their most recent employment to transfer to other work. Finally, while recent technological advancements and stronger civil rights laws have been very beneficial in helping some people with disabilities work, others with significant disabilities face diminishing opportunities as the modern work environment becomes more demanding and less forgiving.[9]

II. The Social Security Disability Standard Is Strict, and Most Applications Are Denied Even After All Levels of Appeal

A common misconception is that the Social Security Administration (SSA) awards disability benefits at high rates to people who are able to work. In reality, the definition of disability is incredibly strict, requiring an individual to prove the inability to do *any* job that exists in significant numbers in the national economy, as described in greater detail above. As previously noted, only about four in 10 applications are approved under this strict definition, even after all stages of appeal. The definition of disability is appropriate and ensures that only those individuals with the most severe disabilities receive benefits. Many SSDI beneficiaries have made repeated attempts to work, often exacerbating their impairments, before finally turning to the program as a last resort.

Contrary to some assertions, while applications have increased in the past few years, approval rates for disability applicants have *fallen* significantly at every administrative level. The allowance rate for initial applications was 33% in fiscal year (FY) 2012, down from 37% in FY 2009. The decrease in the national allowance rate at the ALJ level has been even more dramatic. The national average allowance rate at the ALJ level has declined from 62% in 2007 (the year in which SSA announced its production goals for ALJs) to 52% in FY 2012, and appears to be declining even further so far this year.

Some have alleged that the agency’s production goal has caused the allowance rate to increase (which is flatly contradicted by the statistics cited above). A recent study by Dean Harold J. Krent, IIT Chicago-Kent College of Law, for the Administrative Conference of the United States (ACUS) found, “when considering the entire distribution of ALJs, the data do not support the general proposition that ALJs achieve higher productivity by allowing more claims.”[10]

It is important to note that nearly *two-thirds* of beneficiaries granted benefits are allowed at the initial and reconsideration levels by the state Disability Determination Services agencies, and just about one-third are allowed at the ALJ stage and subsequent levels of appeal. Moreover, there are

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[9] Statement of Virginia P. Reno, Vice President for Income Security Policy, National Academy of Social Insurance, on Securing the Future of the Social Security Disability Insurance Program, before the Committee on Ways and Means, Social Security Subcommittee, December 11, 2012.

[10] Harold Krent & Scott Morris, *Achieving Greater Consistency in Social Security Disability: An Empirical Study and Suggested Reofrms* (2013), at 24, available at http://www.acus.gov/sites/default/files/documents/Achieving_Greater_Consistency_Draft_Report_3-3-2013.pdf.

a number of legitimate 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 typically 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 relevant to the SSA disability criteria.

In addition, claimants' conditions often change and may 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.

Indeed, given that ALJs generally do not write their own decisions, but rather issue instructions to staff decision-writers after reviewing and hearing cases, it is hard to imagine that any judicial officer would respond to production goals by slanting the outcomes of cases in one direction or another; the very premise of such a scenario would violate the fundamental principles of any ethical judicial officer. In my experience representing claimants, there is hardly a rush to award benefits to claimants in response to increased applications or production goals; if anything, the data, as discussed above, show a trend in the opposite direction.

III. The Statutory Definition of Disability Has Not Changed

A second misconception is that the Social Security definition of disability has been "loosened" over time, resulting in higher numbers of beneficiaries. Nothing could be further from the truth. Rather, SSA has abolished its listing of impairments for conditions like diabetes and obesity, leaving claimants suffering from such conditions at a serious disadvantage. Regulatory criteria for other impairments such as liver disease have not been abolished outright, but have been changed to make them virtually impossible to meet. Since statutory amendments in 1996, individuals disabled by drug or alcohol addiction have been barred from receiving disability benefits. Such changes have obviously not increased the numbers of claimants or awards of disability benefits.

1. The Disability Benefits Reform Act of 1984

The Social Security Disability Benefits Reform Act of 1984 (DBRA) is frequently mischaracterized as relaxing the disability standard. DBRA was passed by a unanimous, bipartisan vote in both the House of Representatives (402-0) and the Senate (99-0) in September 1984, and signed into law by President Reagan. Importantly, the legislation did not change the statutory definition of disability. It did require SSA to issue new listings of impairments for mental disorders and develop new procedures for evaluating residual functional capacity for individuals with mental disorders whose impairments did not meet the listings. Before DBRA, SSA relied upon outdated concepts of mental impairment and terminology that did not reflect current medical practice. There was no individualized, realistic evaluation of ability to work, for people with mental impairments. DBRA led to the issuance of new mental listings that were more closely tailored to follow the edition of the American Psychological Association's Diagnostic and Statistical Manual current at that time. DBRA also required SSA to consider the combined effects of multiple impairments in evaluating disability, in recognition of the fact that many people suffer from multiple medical conditions, each of which is not on its own severe enough to prohibit someone from working, but which in combination are totally disabling.

DBRA also led to clarifications about consideration of pain in assessing disability. Specifically, for pain to contribute to a finding of disability, an individual must first establish through medical evidence, the presence of a medically determinable physical or mental impairment that could reasonably be expected to produce the pain or other symptoms alleged. Once such an impairment is established, allegations about the intensity and persistence of pain or other symptoms must be considered in addition to medical evidence in evaluating the extent to which the impairment may affect the individual's capacity for work. Allegations of pain, on their own, are not sufficient to establish disability.

2. Demographics explain most of the growth in SSDI

So what explains the increase in the number of disabled workers receiving SSDI benefits? According to SSA's Chief Actuary, the rise in SSDI beneficiaries is primarily attributable to three key factors: 1) the aging of the baby boomers, 2) the advent of women as full participants in the labor force who have achieved the insured status they formerly lacked, and 3) the increase in the Social Security retirement age from 65 to 66.[11] When disabled workers reach full retirement age, they begin receiving Social Security retirement benefits rather than DI. The increase in the retirement age has delayed that conversion. In December 2012, more than 450,000 people between 65 and 66 — over 5 percent of all DI beneficiaries — collected disabled-worker benefits; under the rules in place a decade ago, they would have been receiving retirement benefits instead.[12]

Some have pointed to the recent economic downturn as a potential driver of growth. Applications for Social Security disability benefits do tend to rise during economic downturns, and the recent economic recession was no exception. However, research finds that while economic downturns significantly boost *applications* for benefits, they have a much smaller effect on *awards*.[13] In fact, available data indicate that the percentage of applicants awarded benefits has actually declined during the recent economic recession, showing that individuals who did not meet Social Security's

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[11] Stephen Goss, Chief Actuary, Social Security Administration, Statement before the House Ways and Means Committee (March 2013). http://waysandmeans.house.gov/uploadedfiles/goss_testimony.pdf.

[12] Kathy Ruffing, Center on Budget and Policy Priorities, Statement before the Subcommittee on Social Security, House Committee on Ways and Means, Hearing on the Challenges of Achieving Fair and Consistent Disability Decisions (March 20, 2013). http://waysandmeans.house.gov/UploadedFiles/Ruffing_Testimony32013.pdf.

[13] Ruffing, *supra* note 3.

strict disability standard were screened out.[14]

3. The ALJ Hearing Process is Fair and Appropriate

A third misconception is that the procedural rules governing ALJ hearings are in need of radical overhaul.

An informal and nonadversarial process. ALJ hearings were designed to be nonadversarial for good reason: *They must be fair and available to all claimants regardless of whether they are represented.* This has been confirmed repeatedly by the longstanding view of Congress, the United States Supreme Court, and SSA, 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, nonadversarial manner."[15] 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….[16]

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.[17]

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

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[14] Social Security Advisory Board, Aspects of Disability Decisionmaking: Data and Materials (Feb. 2012), Chart B.7 at 12, http://www.ssab.gov/Publications/Disability/GPO_Chartbook_FINAL_06122012.pdf.

[15] 20 C.F.R. § 404.900(b), 416.1400(b).

[16] *Sims v. Apfel*, 530 U.S. 103, 110 (2000)(citations omitted).

[17] *Richardson v. Perales*, 402 U.S. 389, 400-401 (1971).

operation.

The process should not be adversarial. Proponents of making the process adversarial by having SSA represented at the ALJ hearing believe that SSA 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.

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.[18]

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 offices). Also, given that the hearings would be adversarial, SSA would be subject to paying attorneys' fees under the Equal Access to Justice Act in appropriate cases.

Given the past experience with government representation and the enormous cost, we believe that the limited dollars available to SSA could be put to better use by assuring adequate staffing at field offices, at the DDSs, and at hearing offices, and developing better procedures to obtain evidence, including reasonable payment for medical records and examinations.

In the current nonadversarial process, SSA's role is not to oppose the claimant. SSA's role is to ensure that claimants are correctly found eligible if the statutory definition of disability, as established by Congress, is met, whether or not a representative is involved. ALJs, like all

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[18] 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.

adjudicators, have a duty to develop the evidence and investigate the facts. Nevertheless, they should view the claimant's representative as an ally in collecting necessary and relevant evidence and focusing the issues to be addressed.

The record should not be closed. In light of the nonadversarial nature of ALJ hearings, we do not support proposals to adopt procedural rules to exclude evidence by, for example, closing the record five days before a hearing. Technical procedural and evidentiary rules have their place in an adversarial system, but they should not dominate the nonadversarial system of adjudication administered by Social Security.

Closing the record before the hearing or at the close of the hearing before the ALJ issues a decision conflicts with the goal of ensuring that there is a complete record—especially since the additional evidence provided may be valuable and probative in determining disability.

There are many legitimate reasons, often beyond the claimant's or representative's control, why evidence is not submitted earlier and thus why closing the record or creating unreasonable procedural hurdles is not beneficial to claimants. We have many concerns—both legal and practical—with closing the record at any point before the ALJ issues a decision, which is the current rule.

Closing the record before the hearing is inconsistent with the Social Security Act. The Act provides the claimant with the right to a hearing with a decision based on "evidence adduced at the hearing."[19] Current regulations comply with the statute by providing that "at the hearing" the claimant "may submit new evidence."[20]

Closing the record is inconsistent with the realities of claimants obtaining representation. As discussed above, many claimants seek and obtain representation shortly before, or even after, the ALJ hearing date. Many claimants do not understand the complexity of the rules or the importance of being represented until just before their hearing date. Many are overwhelmed by other demands and priorities in their lives and by their chronic illnesses. As a practical matter, when claimants obtain representation shortly before the hearing, the task of obtaining medical evidence is even more difficult.

Closing the record is inconsistent with the realities of obtaining medical evidence. 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, representatives have great difficulty obtaining necessary medical records due to circumstances beyond their control. There are many legitimate reasons why the evidence may not be provided earlier. There is no requirement that medical providers turn over records within a set time period. In addition, cost or access restrictions may prevent the ability to obtain evidence in a timely way.

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[19] 42 U.S.C. § 405(b)(1).

[20] 20 C.F.R. §§ 404.929 and 416.1429.

Another factor often outside the claimant’s control, is the problem with obtaining records and information from medical sources. Legitimate reasons why evidence is not submitted earlier include:

- DDS examiners fail to obtain necessary and relevant evidence. Further, the DDSs 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. Witnesses at the Compassionate Allowances hearing noted this “language” barrier and how it causes delays in obtaining evidence, even from supportive and well-meaning doctors.

- Neither SSA nor the DDS explains to claimants or providers what evidence is important, necessary and relevant for adjudication of the claim.

- Claimants are unable to obtain records either due to cost or access restrictions, including confusion over HIPAA requirements. NOSSCR frequently hears from representatives that medical providers have different interpretations of HIPAA requirements and as a result require use of their own forms for authorization to disclose information. Frequently, if the medical records staff finds a problem with the request for information, *e.g.,* it is not detailed enough or a different release form is required, the new request goes to the end of the queue when it is resubmitted.

Claimants—and many representatives—also face difficulties accessing medical evidence due to the cost charged by providers. Medical facilities often require upfront payment for medical records, which many claimants cannot afford. Some states have laws which limit the charges that can be imposed by medical providers; however, many states have no limits. And while some representatives have the resources to advance the costs for their clients, some representatives and many legal services organizations do not.

- Medical providers delay or refuse to submit evidence. Disability advocates have noted that requests for medical evidence are given low priority by some providers. The primary reasons are inadequate reimbursement rates and lack of staff in non-direct care areas, such as medical records. Despite extensive efforts by representatives, such as hiring staff whose sole job is to obtain medical evidence, numerous obstacles and lengthy delays are still encountered in a significant number of cases. Even those representatives who have staff solely dedicated to obtaining medical evidence encounter problems.

- Reimbursement rates for providers are inadequate.

Closing the record is inconsistent with the realities of claimants’ medical conditions. Claimants’ medical conditions may worsen over time and/or diagnoses may change. Claimants undergo new treatment, are hospitalized, or are referred to different doctors. Some conditions, such as multiple sclerosis, autoimmune disorders or certain mental impairments, may take longer to diagnose definitively. The severity of an impairment and the limitations it causes may change due to a worsening of the medical condition, *e.g.*, what is considered a minor cardiac problem may be understood to be far more serious after a heart attack is suffered. It also may take time to fully understand and document the combined effects of multiple impairments. Further, some claimants may be unable to accurately articulate their own impairments and limitations, either because they are in denial, lack judgment, simply do not understand their disability, or because their impairment(s), by definition, makes this a very difficult task. By their nature, these claims are not static and a finite set of medical evidence does not exist.

Also, as with some claimants who seek representation late in the process, their disabling impairments make it difficult to deal with the procedural aspects of their claims. Claimants may have difficulty submitting evidence in a timely manner because they are too ill, or are experiencing an exacerbation, or are simply overwhelmed by the demands of chronic illness, including the time and logistical demands of a caregiver or advocate to help submit evidence.

Current law sets limits for submission of new evidence after the ALJ decision is issued and these rules should be retained. Under current law, an ALJ hears a disability claim *de novo*. Thus, new evidence can be submitted and will be considered by the ALJ in reaching a decision. However, the ability to submit new evidence and have it considered becomes more limited at later levels of appeal.

At the Appeals Council level, new evidence will be considered, but ***only*** if it relates to the period before the ALJ decision and is "new and material."[21] While the Appeals Council remands about one-fourth of the appeals filed by claimants, it is important to note that a major basis for remand 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.

At the federal district court level, the record is closed and the court ***will not consider*** new evidence. Under the Social Security Act,[22] there are two types of remands:

(1) Under "sentence 4" of 42 U.S.C. § 405(g), the court has authority to "affirm, modify, or reverse" the Commissioner's decision, with or without remanding the case; and

(2) Under "sentence 6," the court can remand (a) for further action by the Commissioner where "good cause" is shown, but only before the agency files an Answer to the claimant's Complaint; or (b) at any time, for additional evidence to be taken by the Commissioner (***not*** by the court), but only if the new evidence is (i) "new" and (ii) "material" and (iii) there is "good cause" for the failure to submit it in the prior administrative proceedings.

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[21] 20 C.F.R. §§ 404.970(b) and 416.1470(b).

[22] 42 U.S.C. § 405(g).

While there is a fairly high remand rate at the court level, the vast majority of court remands are not based on new evidence, but are ordered under "sentence 4," generally due to legal errors committed by the ALJ. Because courts hold claimants to the stringent standard in the Act, remands under the second part of "sentence 6" for consideration of new evidence submitted by the claimant occur very infrequently.

On the other hand, remands under the first part of "sentence 6" occur with some frequency. In these cases, SSA may move for a voluntary remand before it has filed an Answer to the claimant's Complaint because a file or hearing tape is lost and the administrative record cannot be completed. Or, SSA may reconsider its position on the merits of the case, realizing that the Commissioner's final administrative decision is not defensible in court.

IV. Strengthening SSDI for People with Disabilities

Because of the importance of SSDI to people with significant disabilities, over the years NOSSCR has made a number of recommendations for strengthening SSDI to improve the system's processes and outcomes for workers with disabilities.

1. Provide adequate administrative resources for the Social Security Administration (SSA).

The Social Security Administration (SSA) requires adequate administrative resources to effectively administer the SSDI program. For many years, SSA did not receive adequate funds for its mandated administrative services. Between FY 2000 and FY 2007, the resulting administrative funding shortfall was more than $4 billion. 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. There can be no doubt that this additional staff greatly enhanced SSA program operations. Unfortunately, SSA's administrative budget (Limitation on Administrative Expenses or LAE) has been inadequate in recent years. SSA has received virtually no increase in its 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. Former SSA Commissioner Astrue and current Acting Commissioner Colvin have both testified about the negative effects of cutbacks in SSA's administrative funds for FY 2012 and 2013 on the agency's staffing, services, and program integrity.[23]We urge Congress to provide SSA with adequate resources to carry out all necessary program functions.

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[23] Statement of Michael J. Astrue, Commissioner, Social Security Administration, before the Finance Committee of the U.S. Senate, May 17, 2012; Statement of Carolyn Colvin, Acting Commissioner, Social Security Administration, before the Committee on Appropriations, Subcommittee on Labor, Health, and Human Services, Education and Related Agencies, U.S. House of Representatives, March 14, 2013.

2. Extend SSA's Title II demonstration authority.

SSDI beneficiaries face a complex set of rules regarding earnings, and, if concurrently eligible for SSI, assets. Demonstrations allow SSA to test additional ways to help beneficiaries navigate the system and can provide important information about assisting beneficiaries to attempt or to return to work. Currently, SSA has demonstration authority for its Title XVI programs, but demonstration authority for the Title II programs expired in 2005. Congress should extend SSA's Title II demonstration authority.

3. Ensure continuation of the Work Incentive Planning and Assistance (WIPA) and Protection and Advocacy for Beneficiaries of Social Security (PABSS) programs.

The WIPA and PABSS programs, established in 1999, provide critically important employment services that help beneficiaries of Social Security's SSDI and SSI disability programs attain greater economic self-sufficiency. WIPA grants go to local non-profits and other agencies to support outreach, education, and benefits planning services for SSI and SSDI beneficiaries about work incentives and services for finding, maintaining, and advancing in employment. WIPA grantees inform beneficiaries about the impact that employment will have on their disability income and medical coverage, and address many of the real fears that individuals have about going to work at the risk of losing health coverage. PABSS provides a wide range of services to SSI and SSDI beneficiaries. This includes information and advice about obtaining vocational rehabilitation and employment services, information and referral services on work incentives, and advocacy or other legal services that a beneficiary needs to secure, maintain, or regain gainful employment. The continued existence of the WIPA and PABSS programs is under serious threat. Although authorization for both programs expired on September 30, 2011, SSA was able to set aside funding to sustain the PABSS program until September 30, 2012 and the WIPA program until June 30, 2012. The recent expiration of funding for the WIPA program already has resulted in the layoffs of many well-trained employees. The impending expiration of funds for the PABSS program will be a loss of vitally important services to beneficiaries. NOSSCR supports measures to continue the WIPA and PABSS programs.

4. Improve program navigation and remove barriers to work.

Over the years, NOSSCR has supported a number of proposals to make it easier for beneficiaries to navigate the SSDI system, particularly when attempting work. NOSSCR supports efforts to improve the disability claims process, including through the use of technology, so long as the changes do not infringe on claimants' rights. SSA has already implemented a number of significant technological improvements that have helped claimants and their representatives and have made the process more efficient for SSA employees. We strongly recommend that SSA develop a better wage reporting and recording system and promptly adjust benefit payments to reduce overpayments. Many individuals with disabilities are wary of attempting a return to work out of fear that this may give rise to an overpayment when reported earnings are not properly recorded and monthly overpayments are not properly and promptly adjusted.

5. **Additional recommendations for strengthening the SSDI program include the following:**

- **Establish an earnings offset in the SSDI program.** One of the most difficult and enduring barriers to work for SSDI beneficiaries is the sudden termination of cash benefits when someone crosses the substantial gainful activity (SGA) threshold after the trial work period. This affects both the individual's benefits as well as those of any dependent(s). Werecommend establishing a $1 for $2 earnings offset in SSDI to parallel the provision in the SSI program. An earnings offset would eliminate the "cash cliff" for beneficiaries who are able to work, and would help ensure that individuals are financially better off by earning wages than by not earning. This long-overdue proposal is currently being tested. The disability community has been advocating for this change for decades.

- **Provide a "continued attachment" to SSDI and Medicare, as long as a beneficiary's impairments last.** Beneficiaries who are sometimes able and other times unable to be employed should have continued attachment to cash and medical benefits that can be activated with a simple and expedited procedure that is as "seamless" as possible. For example, SSA has proposed the Work Incentives Simplification Pilot (WISP). Under the WISP, work would no longer be a reason for terminating SSDI benefits. SSA would continue to pay cash benefits for any month in which earnings were below the established threshold, but would suspend benefits for any month in which earnings were above the threshold. SSA would evaluate whether this pilot simplification reduces the number of improper payments due to work, and allows the agency to redirect those administrative resources to other areas.

- **Support and strengthen programs designed to allow flexibility for people with disabilities to return to work, including programs authorized under the Ticket to Work and Work Incentives Improvement Act (TWWIIA).** These programs offer people with disabilities the options to try different work opportunities without risk of losing their benefits should a return to work be unsuccessful. Providing individuals with disabilities opportunities to work up to their capacity without risking vital income support and health care coverage promotes their independence and self-sufficiency.

- **Revise the rules for impairment-related work expenses (IRWE).** Under current rules, beneficiaries can deduct from earned income the costs of IRWEs; IRWE deductions are made for SGA determinations. The IRWE deduction can be a significant work incentive by allowing individuals with disabilities to obtain services, medical items, and other assistance that allow them to engage in work activity. CCD proposals for revising IRWE include:

    - Applying the current SSI blindness rule to SSDI disability claimants and beneficiaries to allow the consideration of all work expenses, not only those that are "impairment-related." Currently, for Title II and SSI disability claimants and beneficiaries, only those work expenses that are "impairment-related" are considered. However, the SSI income counting rules for individuals who qualify based on statutory blindness are more liberal because all work expenses can be deducted, not only those that are "impairment-related." There is no public policy basis for this continued disparate treatment of people with different significant disabilities.

- Allowing beneficiaries to include their health insurance premiums as IRWEs. This would recognize the higher costs incurred by workers with disabilities who must pay premiums for the Medicaid Buy-In or for continued Medicare after the termination of free Part A benefits.

- Increase the SGA level for all beneficiaries to be the same as the SGA level for beneficiaries who are blind, and maintain annual indexing of the SGA.

6. Caution is warranted in considering reform proposals.

An array of proposals have been put forward to reform SSDI. While some proposals focus on improving the experiences and opportunities of SSDI beneficiaries, some are driven by desired cost savings, with an eye toward addressing the DI Trust Fund's solvency. Many SSDI reform proposals are in the early stages of development and have yet to be evaluated in terms of their impact on current and future beneficiaries or on the solvency of the DI Trust Fund. In fact, the Congressional Budget Office (CBO) recently reviewed proposals for fundamental reforms to SSDI, such as moving to a partial disability system or refocusing SSDI on rehabilitation and reemployment. The CBO found that such changes are unlikely to produce significant short-term savings that would address DI Trust Fund solvency by 2016 (and may in some cases increase short-term costs) and that "only limited evidence is available on the potential impact of such changes."[24]

NOSSCR believes that any reforms to our Social Security system must be evaluated in terms of their impact on current and future beneficiaries. Any reforms must maintain the current structure based on payroll taxes, preserve Social Security as a social insurance program for everyone who is eligible, guarantee monthly benefits adjusted for inflation, preserve Social Security to meet the needs of people who are eligible now and in the future, and restore Social Security's long-term financial stability. We believe that any reforms to Social Security's disability programs, including SSDI, should conform to the following core principles:

1) Preserve the basic structure of Social Security's disability programs, including the definition of disability.

2) Efforts should be made to increase employment opportunities and improve employment

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[24] Congressional Budget Office (2012). Policy Options for the Social Security Disability Insurance program.

outcomes for Social Security disability beneficiaries, but those efforts should not be achieved through any tightening of eligibility criteria for cash benefits and/or narrowing of health care benefits.

3) Given that Social Security disability program beneficiaries have already been found unable to perform substantial gainful activity, participation in work or activities to prepare for work should remain voluntary.

4) Eligibility and cash benefits should not be subject to time limits.

5) Fully fund the administrative expenses of the Social Security Administration.

7. Reallocation is urgently needed.

Finally, with the DI Trust Fund reserves projected to be depleted in 2016, Congress should act expeditiously, as it has done nearly a dozen times in the past, to reallocate payroll taxes between the DI and OASI programs. Both the OASI and DI trust funds would be able to pay full scheduled benefits through 2033 by temporarily raising the 1.8 percent DI share of the 12.4 percent Social Security payroll contribution by 1.0 percent in 2014 and 2015, and then by amounts that gradually shrink to 0.2 percentage points in 2020-2025.[25] Over the years, Congress has reallocated funds between the OASI and DI Trust Funds eleven times, roughly equally in both directions, to keep the Social Security programs on an even reserve ratio.[26] Reallocation is a sensible administrative adjustment that will maintain the confidence of workers that the DI system that they have built up over the years will remain available for them and their families, if needed. Surveys consistently show that Americans value Social Security and are willing to pay for it because of its importance to workers and their families. Reallocation will also allow time for Congress to carefully develop, consider, and evaluate options for assuring the long-term solvency of both the OASI and DI Trust Funds for generations to come.

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In closing, thank you for the opportunity to testify today. I am happy to take any questions that you may have.

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[25] Virginia P. Reno, Elisa A. Walker, and Thomas N. Bethell, National Academy on Social Insurance, Social Security Disability Insurance: Action Needed to Address Finances, Social Security Brief No. 41 (June 2013).

[26] *Ibid.*

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EDUCATION

J.D., University of Pennsylvania Law School, 1984

B.A., Haverford College, 1978

PROFESSIONAL EXPERIENCE

1994-present: Leventhal Sutton & Gornstein, Trevose, Pennsylvania

1987-94: Supervising Attorney, Community Legal Services, Inc., Philadelphia, Pennsylvania

1984-87: Staff Attorney, Atlanta Legal Aid Society, Inc., Atlanta, Georgia

REPRESENTATIVE CASES

Sullivan v. Zebley, 493 U.S. 521, 110 S.Ct. 885, 58 U.S.L.W. 4177 (1990) (co-counsel). Nationwide class action on behalf of children unlawfully denied SSI disability benefits; the Supreme Court's ruling struck down existing regulations and made possible retroactive benefits for over 200,000 children denied benefits over the previous decade.

Ramirez v. Barnhart, 372 F.3d 546 (3d Cir. 2004). Court of Appeals reversed and remanded for new hearing, holding that ALJ failed to include all established limitations in the hypothetical question presented to the Vocational Expert.

Markle v. Barnhart, 324 F.3d 182 (3d Cir. 2003). Court of Appeals reversed and remanded for new hearing, clarifying the law governing claims based on mental retardation.

Walton v. Halter, 243 F.3d 703 (3d Cir. 2001). Court of Appeals reversed denial of benefits and required Commissioner to obtain testimony from a Medical Expert regarding whether the onset of claimant’s disabling bipolar disorder occurred by 1966 pursuant to SSR 83-20.

Rosetti v. Shalala, 12 F.3d 1216 (3d Cir. 1993) (co-counsel). Vacated district court's dismissal of class action challenging SSA's failure to adjudicate HIV/AIDS claims under properly published regulations; resulted in favorable settlement and readjudication of claims of all class members.

Fisher v. Barnhart, 393 F.Supp.2d 343 (E.D. Pa. 2005). District Court reversed and awarded benefits where ALJ had failed to understand disabling symptoms of multiple sclerosis which had existed during the remote time period when the claimant was insured.

Leslie v. Barnhart, 304 F.Supp.2d 623 (M.D. Pa. 2003). District Court reversed and remanded for new hearing where testimony of Medical Expert on which ALJ relied was found to be unreliable and invalid.

Turner v. Barnhart, 245 F.Supp.2d 681 (E.D. Pa. 2003). District Court held that claimant proved she was the common law wife of the deceased worker, and awarded widow's disability benefits.

BAR MEMBERSHIPS

Supreme Court of the United States
United States Court of Appeals for the Third Circuit
United States District Court for the Eastern District of Pennsylvania
United States District Court for the Middle District of Pennsylvania
Commonwealth of Pennsylvania
State of Georgia

PROFESSIONAL ORGANIZATIONS

National Organization of Social Security Claimants' Representatives (NOSSCR): President, 2004-05; Board of Directors, 1998-2007, 2010-present

American Bar Association (Co-Chair, Benefits Committee, Administrative Law and Regulatory Affairs Section)

Philadelphia Bar Association

Federal Bar Association

PUBLICATIONS

"Disability and Sjögren's," The Sjögren's Book (Oxford Univ. Press 2012)

"Economic Justice and the Future of Social Security," Human Rights (ABA Section of Individual Rights and Responsibilities), Summer 2005

"The Physician's Role in Determining Disability," Journal of General Internal Medicine, September 1996

Committee on Oversight and Government Reform
Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)(5)

Name: Thomas D. Sutton

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2010. Include the source and amount of each grant or contract.

None

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

National Organization of Social Security Claimants' Representatives

Past President; Current Member, Board of Directors

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2010, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

None

I certify that the above information is true and correct.

Signature:

Date: June 25, 2013