

**COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM (113th CONGRESS)
SUBCOMMITTEE ON ENERGY POLICY, HEALTH CARE, AND ENTITLEMENTS**

SUBCOMMITTEE HEARING JUNE 27, 2013

**HON. REPRESENTATIVE JAMES LANKFORD, CHAIRMAN (OK)
HON. REPRESENTATIVE JACKIE SPEIER, RANKING MEMBER (CA)**

STATEMENT OF:

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UNITED STATES ADMINISTRATIVE LAW JUDGE
SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY ADJUDICATION & REVIEW
MIAMI, FL**

Chairman Lankford and Ranking Member Speier, thank you for inviting me to present testimony to the Subcommittee. I am honored to be able to report to you what is happening in the trenches from the perspective of one who has been a Social Security line judge for sixteen years.

My biography is attached. I have been a career military officer, litigator, manager, and judge. I would only like to highlight three points in my military career. I am a Viet Nam combat veteran. I am a 1967 graduate of the United States Coast Guard Academy. I was the Chief Trial Judge of the Coast Guard before I retired in 1993.

My father was a World War II veteran, my brother served as an MP in Berlin before the Wall came down; and my wife recently retired as the Victim Witness Coordinator for the United States Attorney's Office for the Southern District of Florida.

I was in private practice for three years after I retired from the Coast Guard. However, most of my professional career has been in the public service. I have a combined forty-two years of military and civil service experience serving the American public. I have been a United States Administrative Law Judge (ALJ) with the Social Security Administration in Miami since 1997.

I had the second highest qualifying score among the sixty appointed judges in my training

group. Judge Patrick McLaughlin, a line judge in Jacksonville, had the highest score and, along with many other line judges, assisted me in preparing my remarks.

Although I feel a majority of line judges share my views, I am testifying in my individual capacity. I paid my own expenses to attend the hearing and am on personal leave.

Shortly before I was appointed a Social Security judge, I represented an uncle who had applied for disability benefits on his own. He was awarded benefits posthumously five years after he applied.

I think I understand how the system does not work and am well qualified to recommend changes to ensure worthy claimants are awarded disability benefits as soon as possible, at the least cost to them and the American public.

This is what Congress intended sixty years ago when they set up the program.

I am going to focus on the authority of the judges and the disability hearing itself, from the perspective of a line judge.

Mr. Chairman, I want to congratulate you on the quality of your staff. I have been very impressed with their knowledge and dedication. However, Mr. Chairman, what if Speaker Boehner selected all your staff and you could not direct them to do any work? You could only “request” that they perform a task because they all worked for the Speaker. That is my position as a judge with the Social Security Administration. Although we also have some excellent staff, none of them works for me. I have no authority over them nor can I direct them to do anything.

The agency says the support staff ratio is 4.5 support staff to every one judge. The agency made the same argument to Congress almost twenty years. At that time, they argued the support staff ratio was 5 to 1. The American Bar Association after analyzing the data, issued a report presented to the ABA House of Delegates by United States District Court Judge Norma L. Shapiro that the actual support staff ratio was zero to one. To quote from the report:

*Thus it is no longer meaningful to speak of support staff ratio to judges, and this has been true for over a decade. The staff do not exist to support the judges' work, but that of management. The true support staff ratio of office personnel to individual judges is now zero to one, . . . a situation that is quite contrary to the agency's representations to the Congress.*¹

Not only do I not have any authority over the support staff, I have no authority over the

¹ 1995 AM 115, American Bar Association Resolution 12 (August 1995) (Attachment C)

attorneys who appear before me. I cannot direct them to submit evidence before the hearing; I cannot direct them to submit all relevant evidence,² not just evidence favorable to the claimant. I can impose no sanction when they withdraw the day of the hearing. I can impose no sanction when they show up at the hearing with hundreds of pages of new evidence, even if the hearing has to be postponed because the medical expert does not have time to read the new evidence.

Last year our Chief Judge, Debra Bice met with the National Organization of Social Security Claims Representatives (NOSSCR). They complained to her that line judges were issuing prehearing orders that contained mandatory requirements or sanctions. She immediately issued a memorandum to “all judges” as a “reminder” that such orders were “inconsistent with Agency law and policy.”³ This is our boss letting the attorneys who appear before us know that we have been warned not to order them to do anything.

Let me describe what happened to three judges in Cleveland who had the temerity to issue a prehearing order ten years ago. The order was a generic prehearing order commonly found in all judicial systems.⁴ The intent is to conduct hearings more efficiently at a savings to the public. However, this order directed that the evidence be submitted before the hearing to a staff supervisor. The judges were charged with insubordination because they had no authority to direct the supervisor to accept the evidence. The resulting litigation lasted several years. While the case was on appeal one of the judges, a close friend, Judge Rob Isbell died. Let me explain how compassionate this agency is if they feel a judge has been insubordinate. After Rob died, they named his widow a defendant in the lawsuit. When I found out, I was for the only time in my life ashamed to be working for the Federal Government. To her credit, when we notified Commissioner Barnhart what had happened, she immediately ordered the General Counsel at the time, Lisa De Soto to dismiss Judge Isbell’s widow from the lawsuit.

Therefore, I am a Judge in name – but no one works for me. Moreover, I am judge who, according to our Chief Judge, has no authority over the personnel in my courtroom. In fact, I cannot even set the time and place of a hearing. Former Commissioner Astrue took this authority away from me.

What is the major problem facing me and the American public?

The present system is not serving deserving claimants or the American public.

² In Alabama, by State Bar Association rule, attorneys must submit all relevant evidence at all proceedings. Alabama is the only state known to have this rule.

³ Use of Prehearing Orders-REMINDER, 12-992 (April 16, 2012)(Attachment C)

⁴ Attachment D

A few years ago, an excellent staff member, and you know she was good because HHS hired her away from us, asked me, “Judge, do you know what the problem is with the system?” I said, no Betty, what is the problem with the system? She replied the problem with the system is that we have so many unworthy claimants filing claims that we cannot get to the worthy claimants in a timely manner.

An outstanding attorney who practices before me recently phrased it differently: “The disability system has turned into a cottage industry for certain claimants’ representatives.” He was referring to large firms who use TV advertising and other methods to sign up clients. Claimants’ representatives collectively make \$1.7 billion in fees annually. That is a large cottage industry. The largest claimants’ firm Binder and Binder was according to the Wall Street Journal was bought by a hedge fund.

Is that what Congress intended when you set up the disability system in 1956?

So after forty-two years of federal service, I no longer feel that I am serving the American public. I feel I am serving the claimants’ representatives, especially a few large law firms; and I am powerless to do anything about it. Too many of them do no work until they receive the Notice of Hearing. If it is bad case, they withdraw shortly before the hearing or the day of the hearing and suffer no penalty. If it is a good case they submit new evidence the day of the hearing.

A few months ago, I had hearings but I was out by our front desk where there is a glass partition. One of the attorneys asked if he could speak to me. I said, “Sure Matt, what’s up?” He told me that his law firm was withdrawing the Request for Hearing for a case that was scheduled for hearing the following day. This case was one of my own remands. For a brief moment, I felt a sense of personal vindication. However, do you think I spent extra time preparing for this hearing and had a medical expert and a vocational expert scheduled to testify, either because the Appeals Council ordered me to do so or because I wanted to make sure the second hearing would be properly conducted? If I were a state court judge, two blocks away from our office, I would have said, “Thank you, Matt. I really appreciate the heads-up. That will be \$1500 in court costs, but I appreciate the heads-up.” However, I am not a state court judge so all I could say was “Thanks, Matt for the heads-up.” The withdrawal the day before the hearing cost the law firm nothing, but the American public had to pay for the expert witnesses and I could have spent my time preparing for the hearing of a worthy claimant.

In another recent case in which I had both a medical expert and a vocational expert scheduled to testify, the attorney showed up at the hearing with more than 50 pages of new evidence. The medical expert was testifying by telephone and did not have a fax machine. I had to

postpone the hearing. The postponement cost the law firm nothing but the American public had to again pay for the experts and an interpreter.

Two weeks ago, I had a full day of hearings. At my 10:00 am hearing the claimant appeared but the attorney was not present. I recessed so I could talk with the staff to see if the attorney had called, I was told the attorney had not called, but had faxed in a Notice of Withdrawal of Representation at 7:40am that morning. I had to continue the hearing because the claimant wanted additional time to find another attorney. This late withdrawal cost the attorney nothing.

The final example is also a case I had this month. It was the last hearing of the day. The attorney was present but the claimant was not. I lack the authority to dismiss a claim if either the attorney or the claimant appears. I asked the attorney if she knew where the claimant was. She told me that they had not heard from the claimant in three months. But then told me, I think a little too smugly: "I guess, Judge, you will have to issue a Notice to Show Cause."

What is the solution?

I have proposed five procedural steps to make the hearings more efficient, reduce staff and save the taxpayers money. They are based on the Disability Service Improvement (DSI) plan proposed by former Commissioner Barnhart, except I propose having a Trust/Treasury Representative as recommended by the American Bar Association in 1995.

1. REQUIRE THAT THE CLAIMANT'S ATTORNEY DEVELOP THE RECORD⁵

Claimants' attorneys and non-attorney representatives make \$1.7 billion a year in fees and are not required to develop the record. Under regulations in effect for fifty years the judge is required to develop the record, whether the claimant is represented or not.

2. REQUIRE CLAIMANT'S ATTORNEY TO SUBMIT ALL RELEVANT EVIDENCE

Unlike other judicial systems, an attorney only has to submit evidence favorable to a claimant.

3. REQUIRE CLAIMANT'S ATTORNEY TO TIMELY SUBMIT EVIDENCE AND WITHDRAW

It is the only judicial system where a claimant's attorney may submit 100's of pages of new evidence the day of the hearing, preventing adequate review by the judge and experts, or

⁵ A fuller explanation and citations are found in Attachment B.

withdraw from the case the day of the hearing requiring the public to pay the additional cost of any experts retained.

4. CLOSE THE RECORD AFTER A DISABILITY HEARING

An attorney may submit evidence on appeal which was withheld at the hearing.

5. APPOINT A REPRESENTATIVE TO PROTECT THE TRUST FUND AND PUBLIC

With a combined nearly 19.5 million adults and children receiving benefits, the disability system is a \$201 billion annual program.

NPR recently reported this is more than is spent on food stamps and welfare combined. They also reported: "In the past three decades, the number of Americans who are on disability has skyrocketed."

Each SSA judge is expected at a minimum to annually award \$75.6 million in present and future benefits without a second federal official in the hearing room to protect the trust fund and public.

A recent Senate report cited an agency finding that 22% of favorable decisions had legal "errors or were insufficient".

The trust representative would be charged with insuring justice is done; the record is complete and worthy claimants are awarded benefits as early as possible; not with defending the agency decision below.

If the trust representative prevented one erroneous payment, the investment in placing him or her in the hearing room would be paid back three-fold. If it were an erroneous denial, the payback may not be as high, but it would achieve the overarching goal of awarding worthy claimants benefits as early as possible and prevent possibly years of appeals.

A representative in the hearing room would also prevent judges from being abusive to claimants and from abusively awarding or denying benefits.

HHS has abandoned "Pay and Chase," after fifty years so should SSA. Errors should be prevented before a final decision is issued, not corrected after the fact.

OPEN HEARINGS

Congress should question the agency as to why the hearings are secret. They may be the only mass secret hearings conducted in the United States involving the public. Many personal injuries trials involve medical evidence. They are conducted in courtrooms open to the public. What is so shameful about applying for disability? The judge can always conduct an in camera session, if sensitive evidence should not be disclosed to the public.

GOALS

An important trait of military leadership and leadership in general is that you never ask a subordinate to do something that you could not do. If the goal is 500 - 700 dispositions, (dispositions include dismissals) neither Chief Judge Bice nor Deputy Chief Allen achieved that goal as a line judge. They only achieved that goal as Hearing Office Chief Administrative Law Judges by receiving hundreds of administrative dismissals. (Chief Judge Bice received 637 dismissals in one year.) If the goal is 500 - 700 decisions, neither Chief Bice nor Deputy Chief Allen ever made this goal as a line judge or HOCALJ.

DISABILITY SERVICE IMPROVEMENT (DSI)

Social Security is an Agency that doesn't listen to its judges. In fact, the line judges are union members because the Agency refused to talk to us. When I became a judge, the judges had a professional association. In 1999, the Agency was planning yet another reorganization called: Hearing Process Improvement (HPI). The president of the Association went to talk to Associate Commissioner, Rita Gier. She told him, "I don't have to talk to you, you are not a Union." Until that time there had been discussion about forming a union, but it never had majority support among the judges. Shortly after Ms. Gier made that statement, 90 percent of the judges voted to form a union.

An exception to the Agency not listening to the judges was former Commissioner Jo Anne B. Barnhart, appointed by President George W. Bush. She spent the first two years of her term meeting and talking to the employees, including the judges. She then came up with a reorganization plan called: Disability Service Improvement or DSI. It was being piloted in Region I when her term ended on January 19, 2007. It had the following features:

- The State Disability Determination Services (DDS) will continue to make the initial determination.
- Individuals who are clearly disabled will have a process through which favorable

determinations can be made within 20 calendar days after the date the DDS receives the claim.

- A Medical and Vocational Expert System (MVES) will enhance the quality and availability of the medical and vocational expertise that our adjudicators at all levels need to make timely and accurate decisions.
- A new position at the Federal level – the Federal Reviewing Official, or FedRO – will be established to review state agency determinations upon the request of the claimant. We intend to have well-trained attorneys serve as FedROs and we expect that this level of review will help ensure more accurate and consistent decision making earlier in the process.
- The right of claimants to request and be provided a de novo hearing conducted by an administrative law judge is preserved.
- The record will be closed after the administrative law judge issues a decision, with provisions for good cause exceptions.
- A new body, the Decision Review Board (DRB), will be created to identify and correct decisional errors and to identify issues that may impede consistent adjudication at all levels of the process.
- And, the Appeals Council will be gradually phased out as the new process is implemented throughout the nation.⁶

A year after Commissioner Astrue took office, he abandoned the implementation of DSI stating it would cost too much.

I am only going to focus on two aspects of DSI – the five-day rule and the Disability Review Board. Claimants' representatives make collectively \$1.7 billion a year in fees. Commissioner Astrue never explained how requiring them to submit all relevant evidence five days before the hearing and closing the record at the end of the hearing would cost the American public more money.

The genius of the Disability Review Board is that it would make the Agency smaller by phasing out the Appeals Council and it would solve a major complaint of many of the judges. Most ALJs complain about remands from the Appeals Council, arguing that the members of the Appeals Council are not ALJs and have never conducted a hearing and, therefore, do not fully understand the hearing process from the perspective of the ALJ. The DRB would consist of three member panels, two of the members being ALJs and the other member being an Appeals

⁶ A full description of DSI by Commissioner Barnhart may be found at http://www.ssa.gov/legislation/testimony_061506.html

Council judge. However, no new Appeals Council judges would be appointed so eventually the DRB panels would consist solely of ALJs. Therefore, rather than having permanent members, like the present Appeals Council, the DRB would consist of a flexible number of three ALJ panels. The number of panels could be increased or decreased, depending on the workload.

Once again, Commissioner Astrue never explained how this would cost the American public more money.

HEARING ROOM PERSONNEL

The hearing room personnel supporting the judge consist of a hearing reporter/monitor who records the hearing and takes limited notes. They used to be independent contractors, but the agency has tried to enter into a master contract for all hearing reporter/monitor. This is also true with interpreters. The judges feel these small business, independent contractors provide a better more reliable service than a national master contract would provide.

The most important expert is the medical expert. When I arrived in Miami it was common to have medical experts testify in person at hearings. However, although fees awarded to claimants' representatives have been increased several times in the sixteen years I have been a judge, the medical expert fees have not increased in more than a quarter of a century. In fact, no one knows the last time the medical expert fees were increased. Therefore, it is rare to have a medical expert attend a hearing, most medical experts testify by telephone.

The last expert is the Vocational expert. Their fees have been increased.

ACUS

The Administrative Conference of the United States (ACUS) just completed a study and adopted recommendations considering the Social Security Disability System.

Achieving Greater Consistency in Social Security Disability Adjudication: An Empirical Study and Suggested Reforms, Harold J. Krent, IIT Chicago-Kent College of Law, Scott Morris, IIT College of Psychology (April 3, 2013)

http://www.acus.gov/sites/default/files/documents/Achieving_Greater_Consistency_Final_Report_4-3-2013_clean.pdf

ACUS has also surveyed all the judges to determine if the DSI Region I pilot should be extended and expanded. The results of the survey have not yet been published.

ABA 1995AM115 REPORT AND RESOLUTION

After rereading the ABA report and resolution, it rings as true today as it did twenty years ago. There has been a systemic procedural problem for more than thirty years since the agency divorced the staff from the judges. Having been a trial judge before coming to the Agency, I agree with the ABA, a judge should not wear three hats, except in pro se cases.⁷ The ABA recommendations should be given serious consideration by the agency. If they are rejected the agency should explain why they were rejected.

CONCLUSION

Social Security Disability system is long overdue for change. I applaud the Subcommittee for focusing on this important issue. I want to thank Chairman Lankford and Ranking Member Speier again for inviting me to appear before the Subcommittee, and I look forward to answering the Subcommittee's questions.

⁷ The full report and resolution may be found at Attachment C.

THOMAS W SNOOK

Education

United States Coast Guard Academy, B.S., 1967; Syracuse University Law School, J.D., *cum laude*, 1974, Editor-in-Chief, *Syracuse Journal of International Law and Commerce*, 1973-1974; New York University, L.L.M., International Legal Studies, 1977

Adjunct faculty, Tulane University Law School, 1983-1987; taught *Governmental Regulation of Shipping and Commerce* in graduate Maritime Law Program.

Officer-in-Charge, Coast Guard Basic Law Specialist Course 1977-1978; five week course for 20-30 new Coast Guard Law Specialists (JAGs); designed curriculum, recruited visiting instructors, taught several courses, supervised small staff which prepared materials and remained on site at Yorktown, Virginia during fall courses.

Bar Membership

New York State Bar Association, District of Columbia Bar Association, Louisiana State Bar Association, Florida State Bar Association.

Federal Bar Association 1974- Present; Federal Administrative Law Judge Conference 2008-Present.

American Bar Association 1974-Present; Chair, National Conference of Administrative Law Judiciary, Judicial Division 2010, Member House of Delegates 2011-Present

Government Experience

JUDICIAL

Chief Trial Judge United States Coast Guard, United States Administrative Law Judge, Social Security Administration Miami 1997-Present.

UNITED STATES COAST GUARD

USCGC Mendota, Damage Control Assistant, 1968-70 included participation in Market Time Operations off coast of Viet Nam for one year, awarded Combat Action Ribbon.

Area Legal Officer, Governors Island, New York; managed largest field legal office in the Coast Guard with over twenty civilian and military lawyers, responsible for eastern part of United States, reported to Vice Admiral and Rear Admiral.

Chief, Military Justice and Chief, Legal Administration Division, HQ, Washington, DC

District Legal Officer, New Orleans, Louisiana; managed legal office with six military and civilian lawyers.

UNITED STATES DEPARTMENT OF JUSTICE

Trial Attorney, Admiralty and Shipping Section, Torts Division, Main Justice, Washington, DC, 1979-1981; litigated mainly oil pollution spills including the largest oil spill in United States history at the time: NEPCO 140 - \$14,000,000.

UNITED STATES DEPARTMENT OF STATE

Special Assistant to Ambassador for Law of the Seas issues, United States Permanent Representative to the United Nations, New York, New York 1989-1991; member Political Section United States Mission to United Nations, United States Representative to the Committee on Peaceful Uses of Outer Space

ASSOCIATION OF ADMINISTRATIVE LAW JUDGES

Elected Member National Executive Board 1999-2010

Co-Chair with HOCALJ Robert Droker, Joint Rules Committee; Drafted Procedural Rules for SSA Hearings

Detailed to Agency to Agency to Work on Implementation Plan for Electronic Files 2006

Co-Chair with RCALJ Garmon, Joint Technology Committee 2004-2008

Member AALJ Education Committee 2004-2010

Vice President Region 4 South 1999-2004; Treasurer 2004-2010; LAR Miami 1999-Present;

Private Practice

Attorney, Hayden & Milliken, Marine Insurance Defense firm, Miami, FL 1994-1997

Awards

Meritorious Service Medal, Coast Guard Commendation and Achievement Medals; Department of State Special Recognition Award; Honor Graduate Military Judges' Course, US Army Judge Advocate General School; Fellow American Bar Association

Born - Syracuse, NY; Married to former Susan E. Joseph of Metairie, LA, 41 years

Resident Coral Gables, FL 19 years