Hearing on Social Security's Improved Disability Determination Process

House Ways and Means Committee
Subcommittee on Social Security

June 15, 2006

Testimony of
Marty Ford
Co-Chair, Social Security Task Force
Consortium for Citizens with Disabilities

ON BEHALF OF:

American Association of People with Disabilities
American Association on Mental Retardation
American Council of the Blind
American Network of Community Options and Resources
American Occupational Therapy Association
Association of University Centers on Disabilities
Bazelon Center for Mental Health Law
Council of State Administrators of Vocational Rehabilitation
Inter/National Association of Business, Industry and Rehabilitation
National Alliance on Mental Illness
National Association of Councils on Developmental Disabilities
National Association of Disability Representatives
National Disability Rights Network
National Multiple Sclerosis Society
National Organization of Social Security Claimants' Representatives
National Organization on Disability
National Rehabilitation Association
NISH
Research Institute for Independent Living
The Arc of the United States
Title II Community AIDS National Network
United Cerebral Palsy
United Spinal Association

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Testimony before the Subcommittee on Social Security of the House Committee on Ways and Means June 15, 2006

Chairman McCrery, Representative Levin, and Members of the Subcommittee, thank you for this opportunity to testify on Social Security's improved disability determination process.

I am a member of the public policy team for The Arc and UCP Disability Policy Collaboration, which is a joint effort of The Arc of the United States and United Cerebral Palsy. I am testifying here today in my role as Co-Chair of the Social Security Task Force of the Consortium for Citizens with Disabilities (CCD). I also serve as Vice-Chair of CCD. 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 (hereinafter "CCD") focuses on disability policy issues in the Title II disability programs and the Title XVI Supplemental Security Income (SSI) program.

Let me begin by applauding Commissioner Jo Anne Barnhart for establishing improvement of the disability determination process as a high priority during her tenure. The problems in the disability determination process have evolved over time and are not easy or simple to resolve. Her placing a high priority on improving the system for people with disabilities required dedication and unwavering commitment of her time and critical resources.

In addition, we commend Commissioner Barnhart's work in making the Disability Service Improvement (DSI) design process an open one. She has sought the comments of all interested parties, including beneficiaries and consumer advocacy organizations, in response to her initial draft and to the Notice of Proposed Rulemaking. She and her staff have listened to disability community concerns and addressed many of them through changes in the final regulations. We do not agree with all of her decisions, but believe that she has made every effort to understand our perspective and to make her decisions in a fair manner.

We also appreciate Commissioner Barnhart's commitment to continue working with us as the final regulations are rolled out to ensure proper implementation and to make corrections, as necessary, where there are unintended harmful impacts on claimants/beneficiaries.

We thank the Subcommittee for its continuing oversight of these important changes to the disability determination process.

There are numerous areas in the new disability determination process which need to be monitored and studied to determine whether implementation is going as planned and whether there are any unintended consequences from some of the new policies. I highlight the major implementation issues as we currently see them below. Of course, we will continue to raise with

the Commissioner and with you any new issues which may arise in the future as implementation proceeds.

As you know, the new regulations will become effective on August 1 in Region 1 (Boston), covering Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. Commissioner Barnhart has indicated her intention to roll out these changes gradually, monitoring implementation in the Boston region for at least one year before expanding the changes to other regions. We believe that this provides an important opportunity to ensure that implementation is occurring as intended and/or to make corrections to the system to ensure proper implementation.

ELECTRONIC FILES

As you know, the success of the new Disability Service Improvement process is highly dependent on the quality and capacity of the electronic system that will ultimately handle all disability claims in the Social Security Administration. Known as "eDib", this system will make it possible for people in different areas of the country to work on a case at the same time and it will make it possible to eliminate delays caused by loss of case files and from physically sending case files from one location to another. The success of the full implementation of the DSI process will depend on the success and efficiency of the eDib system.

Implementation Issues:

Will claimants/representatives have early access to the electronic files and to new materials added to the files? To know what is in the record at any given point during the process, we believe that optimum meaningful access will ultimately require secure online access with a "read-only" capacity. Will this be available to claimants/representatives and, if so, when? In the interim, claimants/representatives will need immediate access to information in the file at each administrative level.

Will claimants/representatives be able to obtain hearing recordings immediately after the hearing (particularly if the claimant first acquires a representative after the ALJ hearing)?

SSA should ensure protection of original documents, which are valuable and sometimes irreplaceable evidence, by requiring that exact, unalterable electronic copies of all originals be permanently maintained in the electronic folder. SSA should track whether claimants/representatives experience any problems with having evidence included in the electronic record.

MEDICAL AND VOCATIONAL EXPERT SYSTEM

The rules call for the establishment of a new Medical and Vocational Expert System (MVES) which will provide expert assistance to adjudicators, especially at the reviewing official (RO) and administrative law judge (ALJ) levels of review. The MVES will be composed of the Medical and Vocational Expert Unit and a national network of medical, psychological, and vocational experts who meet qualifications set by the Commissioner.

Implementation Issues:

SSA should track:

- The experience of ROs and ALJs with obtaining expert opinions from MVES, including SSA's procedures for ensuring that different experts are used at different levels of review for a claimant's case.
- How MVEU handles cases where the claimant has multiple impairments.
- Use of MVEU for requesting Consultative Examinations.
- Inclusion of treating sources as accepted consultative examiners.

In developing criteria for medical and vocational experts, SSA should ensure that:

- Experts are actively practicing and knowledgeable about the issues, including those requiring a local perspective.
- Criteria for inclusion in the national network are made public.
- Credentials of individual experts are made available to claimants/representatives, for example, through a secure, online source.

SSA should expand the range of expertise available to adjudicators, including occupational therapists, nurse practitioners, physical therapists, registered nurses, psychiatric social workers, and others. Since many of the Listings have a functional component and over half of adult cases are decided on the Listings, such experts, who are trained to evaluate functional limitations and their impact on the ability to work, can help the adjudicators make better decisions.

INITIAL DECISION

As Commissioner Barnhart has pointed out many times, it is critical that there be better development of evidence at earlier stages of the review process. Success in this area is intended to reduce the demand for further review of cases through the appeals process.

The quality of the information/evidence developed for the record will have a significant impact on whether SSA will be able to make the correct decision earlier in the process – one of the Commissioner's key goals for DSI. Asking focused questions of treating sources can elicit information that will be more effective in helping adjudicators reach individualized decisions than a scatter-shot approach which results in much missed, but critical, detail.

In addition, the Commissioner has developed a Quick Disability Determination (QDD) process to ensure that people who are clearly disabled, for whom readily obtainable evidence exists, will move through the process very quickly. A predictive model will identify these claims so that the decisions can be expedited.

Implementation Issues:

SSA will need to determine:

- Whether claimants/representatives are assisted to understand the disability process and what types of evidence need to be obtained.
- Whether providers are given understandable information about what information is needed for adjudication of the claim and whether the Disability Determination Service (DDS) and the RO obtain individualized evidence from the treating sources.

For the QDD process, SSA should track the experience of cases where the QDD unit cannot make a fully favorable determination to ensure that the cases return to the normal DSI process without any adverse consequences to the claimant.

SSA should collect data to indicate how the QDD process compares to decisions of presumptive disability and the TERI (terminal illness) cases.

SSA should collect data on the implementation of the QDD provisions and the predictive model: how many people go through the process; how many are allowed; what impairments they have; etc.

Will the predictive model for the QDD step be public?

FEDERAL REVIEWING OFFICIAL

The federal Reviewing Official level is new in the adjudicatory process. As such, there are many questions about implementation. The RO review will be the first step in the appeals process for claimants. It will also be the first federal level of review for the claimant. Further, it is intended to address the often-raised issues about consistency of decision-making across the country. The RO will not conduct a hearing, but rather will review the developed record and will further develop evidence, as necessary. The RO is a key figure in ensuring that evidence is fully developed and is given subpoena power to gather evidence. The RO level carries a heavy burden in the new DSI and we urge SSA to pay close attention to its careful implementation.

Implementation Issues:

SSA should ensure proper notification of the right to representation and assess whether the earlier notice is resulting in more representation and better development of the record before claimants reach the ALJ level.

SSA must ensure that the requirement to consult with MVEU does not direct a certain type of decision regardless of the individual circumstances. Also, SSA should track whether the RO's required consultation with the MVES results in unreasonable delays in reaching a decision.

SSA must ensure that the claimant can submit evidence up to the time the decision is issued.

SSA should track experience with:

- Review by ROs in a different part of the country from where the claimant lives.
- Whether nationwide consistency (reduction of state-by-state disparity) has improved.
- Processing time at the RO level.

SSA should track the RO use of subpoena power to ensure that evidence is fully developed.

ADMINISTRATIVE LAW JUDGE

The administrative law judge (ALJ) level is not new and the claimant's right to a *de novo* hearing before an ALJ has been preserved. However, there are numerous changes in the procedures, including timeframes for submitting evidence and scheduling hearings. In addition, the ALJ

level attains new importance since it may be the claimant's last step in the administrative process (except for an ALJ's dismissal of a hearing), before filing in federal court, if the Decision Review Board (DRB) does not select the case for review. With these changes, SSA's vigilance in monitoring implementation will be critical.

Implementation Issues:

SSA should track experience with the scheduling of hearings:

- Track how many claimants waive notice of 75 days.
- Track claimant experience with objections to time/place of hearing and issues for the hearing.
- Track experience with the rule for submitting pre-hearing evidence 5 business days before the hearing, including tracking denials of a request to submit evidence after the 5 days.
- Track post-hearing evidence submission and decisions about whether the relevant criteria are met.
- Track whether claimants receive a hearing date within 90 days of filing the request for hearing.

Regarding evidence development, SSA should track:

- How many claimants are still missing key evidence from their files when they reach the ALJ level and how that compares to the previous system.
- Whether ALJs meet their own obligations to develop evidence.

Regarding the exceptions for submitting evidence within five business days of the hearing or later, SSA should:

- Ensure ALJ understanding of the requirement to find that the exception criteria are met in delineated circumstances.
- Ensure ALJ understanding of "unavoidable" to include claimant's/representative's inability to acquire evidence from third parties (such as treating source, lab, hospital, etc.).
- Ensure ALJ understanding of the difference between "reasonable possibility" that evidence will "affect" the outcome before the decision is rendered and "reasonable probability" that evidence will "change" the outcome after the decision has been issued.
- Assess whether ALJs are properly applying these standards. If not, what will SSA do to rectify the situation?

SSA should ensure that the findings integrated template (FIT) does not direct decisions in any particular way.

SSA must address how it will ensure a safety net for claimants who experience ALJ bias or misconduct, including SSA's use of the Merit Systems Protection Board procedures.

DECISION REVIEW BOARD

The Decision Review Board is a new entity which follows the ALJ level and replaces the Appeals Council. However, the DRB will be much different than the current Appeals Council. Claimants will have no right to appeal to the DRB. They may submit a written statement upon

the request of the DRB or within 10 days of notice that the DRB will review the case. The timelines for decisions by the DRB, the deadlines for filing in federal court, the timelines for an appeal of an ALJ's dismissal of a hearing, and the relationship among all these may prove very confusing to claimants and their representatives.

Since the DRB step is vastly different from the Appeals Council step and the impact on the federal courts is unknown, SSA's careful monitoring of this step in the Boston region will be critically important. For the new DSI process to be successful, SSA should be prepared to address major problems immediately and to consider changes and adjustments as necessary if the impact on claimants and/or the courts is detrimental.

Implementation Issues:

SSA should ensure that claimants/representatives receive clear guidance on the timelines for: submitting a written statement upon the request of the DRB or within 10 days of notice that the DRB will review the case; decisions by the DRB; the deadlines for filing in federal court; the timelines for an appeal of an ALJ's dismissal of a hearing; and the relationship among these deadlines.

During the time in which SSA is reviewing 100 percent of the cases at the DRB level in the Boston region, we think it is important for SSA to:

- Assess the role of the predictive model in detecting the appropriate cases for review – can the model predict the full range of error-prone cases? SSA should examine (1) the cases that the DRB would have reviewed (using the predictive model) against (2) those cases where a significant change was made based on the 100% review but where DRB would not have reviewed the case based on the predictive model.
- Assess the role of the claimant's statement in highlighting the issues for DRB review. SSA should assess the predictive model both with and without the claimant's statements of the case. The results may indicate whether SSA needs to re-assess the role of claimant statements and whether they are critical in raising issues that the predicative model fails to recognize.

Track the results of the 10-day limit on submitting written statements to the DRB, including where a representative or claimant is unavailable during that time, and what impact there may be on the claimant's case if no statement is filed.

Where a representative is new to the claimant, ensure that the representative can get a copy of the hearing recording and the record before the ALJ as soon as possible so as not to miss the 10-day limit for submitting a written statement, or to provide an extension of time.

For those cases which are filed in federal court in the Boston region, undertake a thorough review of the case to determine whether there has been a failure of the new system anywhere along the line.

Ensure continuation of the Appeals Council until the DRB has proven successful in the vast majority of cases.

Track notification of claimants regarding their rights to appeal to federal court.

Other questions:

- How and when will the predictive model be updated? Will the predictive model be made public?
- How will SSA address the Appeals Council's current role in resolving non-disability issues?

FEDERAL COURT

The impact on the federal courts will be a key factor in determining whether the new DSI process is successful. Some of the issues are discussed above regarding the DRB.

Implementation Issues:

In addition to those issues described above regarding the DRB, SSA should:

- Track its experience regarding the number of cases going to federal court to determine whether there is an increase or a decrease.
- Track the number and proportions of SSA's requests for voluntary remands of cases appealed to federal court. Assess the rationale for these requests for voluntary remands and determine whether an earlier failure in the system created the problem.

OTHER/OVERALL ISSUES

There are several procedures/practices which overarch several levels of review. Theses include payments and reimbursement rates to providers; differences in Circuit Court decisions; the new in-line quality assurance systems and feedback loops; issues regarding redaction; operating procedures; and SSA's demonstration authority.

Implementation Issues:

To address these issues, SSA should:

- Ensure that reimbursement rates (ex.: for consultative examinations, copies of records, etc.) are in line with actual costs to providers.
- Ensure that quality assurance feedback loops operate as intended and do not create pressure on the level below to make a certain type of decision regardless of evidence (undue influence).
- Clarify that the requirement that evidence not be redacted applies only to redactions by the claimants/representatives, not to redactions made by the provider (treating physician, lab, hospital, or other treatment source). Redactions that are made by such third party outside of the control of the claimant/representative should not disqualify that evidence for the claimant.
- Where there are acquiescence rulings or differences among the Circuit Courts on an issue, ensure that decision-makers who operate nationwide (or who are not located in the same area as the claimant) apply decisions and rulings properly in the affected regions/states.

- Ensure that the operating procedures are written in a way to ensure the effective and efficient implementation of the final regulations with no unintended consequences or burdens falling on claimants.
- Make operating procedures available to claimants and representatives and include guidance on situations they will newly encounter (such as how to send evidence to the RO assigned to the case).
- Conduct thorough assessments of the demonstration programs (provision of interim minimum health benefits, waiving 24-months waiting period, medical home centers, etc.).

SSA'S LIMITATION ON ADMINISTRATIVE EXPENSES

I would be remiss if I failed to note the importance of fully funding SSA's Limitation on Administrative Expenses (LAE).

To meet the needs of claimants and beneficiaries during the hurricane emergencies in 2005, SSA was required to redirect $38 million from a budget that had already been reduced $300 million below the President's request for this fiscal year (FY'06). A supplemental appropriation of $38 million, included in the conference report of the supplemental appropriations bill, will help to restore the loss of resources due to the hurricanes so that SSA may continue addressing its substantial on-going workload.

SSA must have the resources to handle its day-to-day work. SSA is a well-managed agency and does a good job with the resources it has been appropriated. However, we have been concerned, and continue to be concerned, that SSA does not have adequate resources to meet all of its current responsibilities, including those of importance to people with disabilities. This includes the need to regularly conduct continuing disability reviews (CDRs). As I understand, the House Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies has reported a bill that would reduce the President's budget request for SSA's LAE by $201 million, funds which would have been used for conducting additional CDRs. We are hopeful that the full House will ultimately approve a bill that restores the President's full request so that SSA can continue its important work on the disability programs, including conducting CDRs.

ADDITIONAL CONGRESSIONAL ACTION NEEDED

Congress should extend SSA's statutory Title II demonstration authority. Its authority was extended in the Social Security Protection Act of 2004 (P.L. 108-203). The extended authority expired on December 18, 2005, and no new demonstration programs can be initiated.

Conclusion

As stated in our testimony before this Subcommittee in September 2005, while justice delayed can be justice denied, justice expedited also can result in justice denied. As organizations representing people with disabilities, we strongly support efforts to reduce unnecessary delays for claimants and to make the process more efficient. At the end, the goal is to have the right decision, not just a legally defensible decision. We believe it is necessary to examine all of the

issues outlined above to assess whether there are any unintended results and to ensure appropriate revisions in a timely manner.

We look forward to continuing to work with Commissioner Barnhart and this Subcommittee as implementation of the new DSI process unfolds.

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