



## The Social Security Disability Appeals Process

Under the Social Security Act, eligibility for disability benefits is restricted to individuals who are unable to engage in substantial gainful activity (SGA) due to a mental or physical impairment, or combination of impairments, that has lasted at least a year or which is expected to result in death. Medical evidence is the cornerstone of the Social Security disability determination process.

The Social Security Administration's (SSA) administrative review process for deciding disability claims includes four levels: (1) Initial Determination; (2) Reconsideration; (3) Hearing before an Administrative Law Judge (ALJ); and (4) Review by the Appeals Council. ***Even after all stages of appeal, only about 4 in 10 of those who file claims are awarded benefits.***

This paper describes the Social Security disability application and appeals process, with greatest attention paid to level three, the ALJ hearing.

### **Level 1: Initial Determination**

Claims for Social Security disability benefits are initially reviewed by state agencies called Disability Determination Services (DDS), which are funded by SSA and guided by SSA's national policies and procedures for reviewing disability claims. The initial determination is based on a review of available medical and other evidence. Applicants typically must wait about three to five months for a decision. **The vast majority of disability claims are denied, and only about one-third awarded benefits at this level.**<sup>1</sup> Nearly half of applicants denied at the initial level drop out and do not appeal.

### **Level 2: Reconsideration**

Those who do appeal proceed to another level of paper review by the DDSs called Reconsideration.<sup>2</sup> Only about one in ten who appeal are awarded benefits at this level<sup>3</sup> in a process that requires applicants to wait another several months for a decision. Close to one-third of individuals denied at this stage drop out and do not appeal.

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<sup>1</sup> Social Security Administration, SSA FY 2015 Budget Justification, p. 144 (March 2014), <http://www.socialsecurity.gov/budget/FY15Files/2015FCJ.pdf>.

<sup>2</sup> Under an extended pilot project, ten states do not have Reconsideration. In these states, claimants denied at the DDS level appeal directly to the Administrative Law Judge hearing level.

<sup>3</sup> *Supra* note 1.

### **Level 3: Hearing Before an ALJ**

Individuals who do appeal must wait on average more than a year for a hearing before an ALJ, which is a *de novo* review of the evidence. In the longstanding view of Congress, the United States Supreme Court, and SSA, the ALJ hearing is by design an informal, nonadversarial process.<sup>4</sup> The role of the ALJ is to develop the evidence and serve as neutral fact-finder. SSA's role is not to oppose the claimant, but rather to make an accurate decision as to whether the claimant is disabled under the Social Security Act. The claimant has the right to appoint a representative who may submit evidence and arguments on the claimant's behalf and call witnesses to testify at the hearing before the ALJ. The ALJ may call vocational and medical experts to offer opinion evidence, and the claimant or claimant's representative has the right to question these witnesses. The ALJ may leave the record open after the hearing if s/he believes additional evidence is needed to make a decision. Once the record is complete, the ALJ considers all evidence in the record and makes a decision based on a preponderance of the evidence.

Currently, less than half of ALJ appeals result in a finding of eligibility.<sup>5</sup> Consistent with the decline in award rates across all administrative levels of the disability determination and appeals process, this marks a significant drop in recent years – ALJ allowance rates have fallen by fourteen percentage points between FY 2007 and FY 2013, the lowest rate in forty years.<sup>6</sup>

The ALJ hearing is a *de novo* review, and an ALJ's decision to award benefits is not in conflict with the decision to deny benefits at earlier stages in the process.

- *During the year-plus wait for a hearing, many claimants' conditions deteriorate.*
- *Claimants continue to see their medical providers and in many cases are referred to specialists, seek treatment from additional sources, and / or are hospitalized – all of which yields new medical evidence not available at the earlier reviews.*
- *By the time of the hearing, the record frequently contains medical and other evidence that was not obtained by DDS at the time of the earlier reviews. Many claimants' applications for benefits are incomplete. The application may not allege all impairments, disabling conditions, and vocational limitations the claimant is facing, or include all medical providers and hospitals the claimant has seen. The ALJ hearing level is when most claimants seek advice and representation from disability advocates, who gather*

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<sup>4</sup> Most recently, in *Sims v. Apfel*, 530 U.S. 103, 110 (2000), the Supreme Court once again confirmed the Congressional intent that the SSA hearings process be informal and nonadversarial, stating: "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..." (*citations omitted*). In clarifying the longstanding nature of their views on this matter, the Court pointed to their decision in *Richardson v. Perales*, 402 U.S. 389 (1971), which was then nearly 30 years old.

<sup>5</sup> *Supra* note 1.

<sup>6</sup> Testimony of Glenn Sklar before the U.S. House of Representatives Committee on Oversight and Government Reform, Subcommittee on Energy Policy, Health Care and Entitlements, Nov. 19, 2013.

*medical and other evidence of the individual's disabling conditions and ensure that the record is as complete as possible.*

ALJs have “qualified decisional independence,” which enables them to issue decisions free from influence or pressure to reach a particular result in any individual case.<sup>7</sup> The purpose of this qualified decisional independence is to ensure a fair adjudicatory process for claimants. It does not, however, permit an ALJ to issue a decision that is inconsistent with Social Security’s laws, regulations and policies.

To ensure accurate decision-making, since FY 2011, SSA’s Division of Quality (DQ) has conducted “pre-effectuation” reviews (before benefits are authorized to be paid) on a random sample of ALJ allowances, as well as targeted “post-effectuation” reviews on hearing offices, ALJs, representatives, doctors, and other participants in the hearing process.<sup>8</sup>

Average waiting time for a hearing decision peaked in 2008 at 534 days, an unacceptably long wait for individuals with serious disabilities, including terminal illnesses. As one step to address the disability hearings backlog, SSA adopted a “disposition goal” for ALJs in FY 2007. The goal is for ALJs to issue 500-700 legally sufficient dispositions per year and functions as an expectation. It is simply a goal, not a quota or mandate. Allegations that some ALJs might be responding to the new disposition goals by approving more cases are contradicted by the data. As noted above, **ALJ allowance rates have dropped significantly since FY 2007**, and a recent study conducted for the Administrative Conference of the United States (ACUS) found that **“the data do not support the general proposition that ALJs achieve higher productivity by allowing more claims.”**<sup>9</sup>

SSA previously tested – and later terminated – a pilot project to have the agency “represented” at ALJ hearings, the **Government Representation Project (GRP)**. First proposed in 1980, the plan encountered a hostile reception at public hearings and by Members of Congress and was withdrawn. It was later revived in 1982 and instituted as a one-year experiment, but terminated after it was **found to be ineffective and costly, as well as unconstitutional and in violation of the Social Security Act.**<sup>10</sup> Based on the stated goals of the GRP – to improve decision-making and reduce delays in making hearing decisions – the project was a failure. Congress found that: 1) processing times were lengthened; 2) the quality of decisionmaking did not improve; 3) cases were not better prepared; 4) government reps generally acted in adversarial roles; and 5) the costs were very high. The cost of the pilot was \$1 million per year in 1986 dollars, for only five hearing offices (there are currently more than 160 hearing offices nationally).

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<sup>7</sup> The term comes from case law interpreting the Administrative Procedures Act. See, e.g., *Nash v. Califano*, 613 F.2d 10, 15 (2nd Cir. 1980).

<sup>8</sup> *Supra* note 6.

<sup>9</sup> Harold Krent and Scott Morris, *Achieving Greater Consistency in Social Security Disability: An Empirical Study and Suggested Reforms* (2013) at 24, available at [www.acus.gov/sites/default/files/documents/Achieving\\_Greater\\_Consistency\\_Draft\\_Report\\_3-3-2013.pdf](http://www.acus.gov/sites/default/files/documents/Achieving_Greater_Consistency_Draft_Report_3-3-2013.pdf).

<sup>10</sup> In *Sallings v. Bowen*, 641 F. Supp. 1046 (W.D.Va. 1986), the Federal District Court held that the GRP was unconstitutional and in violation of the Social Security Act. In July 1986, it issued an injunction prohibiting SSA from holding further proceedings under the project. See Testimony of Glenn Sklar, *supra* note 5; see also Testimony of Thomas Sutton, before the U.S. House of Representatives Committee on Oversight and Government Reform, Subcommittee on Energy Policy, Health Care and Entitlements, June 27, 2013.

#### **Level 4: Review by the Appeals Council**

Many claimants denied at the ALJ level elect subsequent review by Social Security's Appeals Council (AC). Those who do appeal face another long wait (typically a year or longer) for their ALJ decision to be reviewed. AC review is not *de novo*. The AC reviews ALJ decisions along with all the evidence of record, plus any new and material evidence relating to the period before the ALJ's decision, and any arguments submitted by the claimant or claimant's representative. The AC may grant or deny review.<sup>11</sup> If the AC grants review, it may uphold the ALJ's decision in part or in whole, issue its own decision (very rare), remand the case to an ALJ, or dismiss the hearing request. Claimants dissatisfied with the AC's decision may file an appeal in federal court.

#### **Federal Court Review**

Very few claimants file appeals in federal court. Federal court review is not *de novo*, but examines whether SSA's decision is supported by substantial evidence. If the court finds that SSA failed to follow the correct legal standards or that the findings of fact were not supported by substantial evidence, the court typically remands the case back to SSA for further action (or extremely rarely, reverses the decision and finds the claimant eligible for benefits).

#### **The Role of the Representative in the Appeals Process**

Claimants seek representation for a number of reasons. The SSA disability determination process is very complex and beyond the capacity, training, or experience of many claimants to negotiate without knowledgeable assistance. The application and appeals process can be procedurally daunting, especially for individuals in poor health, with mental impairments and/or with limited education or literacy. Exactly why a claim has been denied is frequently a mystery to the claimant who receives an initial denial notice. Moreover, for individuals who are no longer able to work, have exhausted all other options, and are no longer able to support their families, it is a time of great anxiety and stress, with undeniably high stakes. As a result, many individuals applying for disability benefits choose to obtain an attorney or non-attorney representative to help with their appeal.

The primary function of the claimant's representative is to represent and protect the rights of the claimant. Representatives also serve as a valuable resource for SSA, by helping to streamline the disability determination process. Representatives explain the process and disability standard, often with greater specificity than SSA; identify an accurate, complete list of impairments and health conditions; and marshal medical and other evidence in support of the claimant's entitlement to benefits. At the ALJ hearing, representatives thoroughly question medical and vocational experts – something very difficult for *pro se* claimants to do. They also frequently prepare legal briefs analyzing the facts of the case and applying them to the statutory standard – sometimes sparing the need for a hearing. Most representation occurs at

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<sup>11</sup> The Appeals Council will grant review if: 1) there appears to be abuse of discretion by the ALJ; 2) there is an error of law in the ALJ's decision; 3) the actions, findings or conclusions of the ALJ are not supported by substantial evidence, or 4) there is a broad policy or procedural issue that may affect the public interest. 20 C.F.R. §§ 404.970 and 416.1470.

the hearing level; however, many claimants' representatives represent claimants prior to the hearing level, by helping them file their applications, obtaining medical evidence in support of the application, and by assisting in appealing if their applications are denied.

Given the benefits and importance of representation, the Social Security Act requires SSA to provide information on options for seeking representation, whenever the agency denies a claimant's application for benefits.<sup>12</sup>

The fee process for Social Security claims is highly regulated. Representatives earn fees on a contingency basis, which means that fees are paid only if the claim is allowed. Most representatives choose the fee agreement process because it is most efficient for both representatives and for SSA. Under the fee agreement process, fees are capped at \$6,000 or 25 percent of the claimant's past due benefits, whichever amount is smaller.<sup>13</sup> The average fee in a case is less than \$3,000.<sup>14</sup>

All representatives who practice before SSA must comply with SSA's Rules of Conduct and Standards of Responsibility,<sup>15</sup> which specify both affirmative obligations and prohibited behavior. For example, the Rules require representatives to act with "reasonable diligence and promptness in representing a claimant" and "provide competent representation to a claimant." A representative may not "[t]hrough his or her own actions or omissions, unreasonably delay or cause to be delayed, without good cause ... the processing of a claim at any stage of the administrative decisionmaking process." If a representative violates the Rules, SSA may file charges and bring proceedings to suspend or disqualify that individual from acting as a representative before SSA. In addition to the SSA Rules of Conduct, attorneys are subject to the Professional Rules of Conduct of their respective State Bars and, ultimately, could be sanctioned, leading to the suspension of the right to practice law.

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<sup>12</sup> 42 U.S.C. §§ 406(c) and 1383(d)(2)(D).

<sup>13</sup> Some representatives choose to use the fee petition process, through which they submit their time records and fee request and the adjudicator determines the fee for each individual case. At the Federal Court level, fees are governed by 42 U.S.C. § 406(b) and are set by the judge in each individual case.

<sup>14</sup> Social Security Administration, Statistics on Title II Direct Fee Payments to Claimant Representatives, <http://www.ssa.gov/representation/statistics.htm>.

<sup>15</sup> See 20 CFR §§ 404.1705 and 416.1505.