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## PROFILE OF A SOCIAL SECURITY DISABILITY CASE

FRED DAVIS\* AND  
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The attorney representing a client making a claim for social security disability benefits faces circumstances and procedures surprisingly different from those associated with normal civil litigation. Some of these different circumstances and procedures will be described in this article and illustrated through a chronicle of their application in the highly instructive decision of the Eighth Circuit in *Landess v. Weinberger*,<sup>1</sup> a case in which the claimant was represented by James Reynolds, co-author of this article.

A common assumption is that the Social Security Administration (hereinafter "SSA") is exclusively concerned with the payment of benefits to retired workers. However, the SSA also administers a broad range of direct benefit programs which include survivorship benefits,<sup>2</sup> supplemental security income benefits (SSI),<sup>3</sup> black lung benefits under the so-called "Black Lung Act,"<sup>4</sup> and the disability benefits with which this article is concerned.<sup>5</sup>

### THE DISABILITY BENEFITS PROGRAM

The disability benefits program is the most controversial of the benefits programs administered by the SSA. In 1970, for example, there were 862,526 claims filed for disability benefits. It is clear that the great majority of appeals from final decisions of the Secretary of the Department of Health, Education and Welfare (hereinafter "HEW") are concerned with disability benefits denials.<sup>6</sup>

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1. 490 F.2d 1187 (8th Cir. 1974). For another useful discussion of practical considerations in the processing of a social security disability claim, see Bloomfield, *Disability Claims Under the Social Security Act*, 6 CAPITAL U.L. REV. 371 (1977).

2. 42 U.S.C. § 402 (Supp. V 1975); H. MCCORMICK, SOCIAL SECURITY CLAIMS AND PROCEDURES 5 (1973).

3. 42 U.S.C. §§ 1381-85 (Supp. V 1975).

4. 30 U.S.C. §§ 901-60 (Supp. V 1975); H. MCCORMICK, *supra* note 2, at 527. Since 1974, however, black lung claims have been administered by the Department of Labor. 30 U.S.C. §§ 902(c), 931-36 (Supp. V 1975).

5. 42 U.S.C. § 401 (Supp. V 1975); H. MCCORMICK, *supra* note 2, at 6.

6. R. DIXON, SOCIAL SECURITY DISABILITY AND MASS JUSTICE 4-9 (1973).

The basic program was established by Congress in 1956 following years of debate concerning both its propriety and whether it could be tied in with the Social Security system, which originally was designed for retirement benefits only.<sup>7</sup> The idea of the disability benefit program is simple. If a worker or one of his surviving dependents, who normally would not qualify for social security benefits until achieving retirement age, becomes disabled, he may begin to receive his retirement benefits at once and need not wait until retirement age is reached. The original program required a person to have attained at least the age of 50, but in 1960 even that limitation was removed.<sup>8</sup>

The major problem with the program was foreseen by those who had had experience with private sector disability insurance programs.<sup>9</sup> Whether a person has an earnings record and has achieved the age of 65 are factual determinations which typically do not invite debate. For this reason appeals from final decisions of HEW in the administration of its retirement benefits programs are relatively rare.<sup>10</sup> However, whether a person is so disabled that he is prevented "from engaging in any gainful activity"<sup>11</sup> is quite another thing. The answer to that question depends upon complex medical judgments as well as economic appraisals of the labor market. Moreover, when eligibility credentials involve factors other than the passage of time or death, the private sector experience has indicated a clear but subtle psychological incentive on the parts of persons covered by disability insurance policies to create or encourage conditions which would make them eligible for benefits.<sup>12</sup>

Experience has borne out the fears of the early skeptics. Eligibility for social security disability benefits, turning as it does on condition characterizations dependent upon highly subjective appraisals, accounts for an alarmingly high percentage of litigated claims against the federal government.<sup>13</sup> As a result, the likelihood that an attorney in general practice will find himself representing such a claimant is greater than ever.

#### FEEES AND THE ROLE OF THE ATTORNEY

It is clear that the vast majority of benefits applications to SSA are made by claimants who are not represented by an attorney.<sup>14</sup> After the SSA

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7. R. DIXON, *supra* note 6, at 14-18.

8. Social Security Amendments of 1960, § 401, 42 U.S.C. § 423(a) (1970).

9. R. DIXON, *supra* note 6, at 16.

10. *Id.* at 19.

11. 42 U.S.C. § 423(d) (2) (B) (1970).

12. G. GOLDSBOROUGH, W. TINSLEY & A. STERNBERG, *THE SOCIAL SECURITY ADMINISTRATION: AN INTERDISCIPLINARY STUDY OF DISABILITY EVALUATION*, 467-68 (1963), cited in R. DIXON, *supra* note 6, at 16-17.

13. R. DIXON, *supra* note 6, at 5-9.

14. An authoritative commentator has recently stated that disability claimants are represented by attorneys in only about 20% of the formal hearings. Smith, *Social Security Appeals in Disability Cases*, 28 ADMIN. L. REV. 13, 14 (1976).

has completed its internal processing and denied the claim after full reconsideration, the claimant, more often than not, will pursue the formal hearing processes before the Administrative Law Judge and the Appeals Council without seeking the advantage of legal representation.<sup>15</sup> In the *Landess* case, although the claimant did not seek representation until after the administrative hearing, she did have the assistance of an attorney in formulating her presentations to the Appeals Council.<sup>16</sup>

Whether brought into the case early or late, the attorney should be aware of the singular requirements and limitations on fees applicable to those representing SSA claimants. Any attorney in good standing and admitted to practice before the courts of a state or territory of the United States may represent a claimant in a social security proceeding and will enjoy both the authority and responsibility with respect to the claim which he would have in a typical lawsuit.<sup>17</sup> The attorney's fee, however, is subject to some unusual limitations. Although either the administrator (if the claim is settled administratively) or the court may certify the direct payment to the attorney of his fee from the benefits awarded to a claimant,<sup>18</sup> it is important to note that the fee is limited to the lesser of three alternatives: (1) 25 percent of the claimant's and his family's past-due benefits;<sup>19</sup> or (2) whatever amount the court or the administrator has fixed as reasonable;<sup>20</sup> or (3) the amount of fee agreed upon between the claimant and the attorney.<sup>21</sup>

It is important to remember that the statutory limitations are maximum limitations, and it is not unusual for either the court or the agency to fix a fee below those maximum limits.<sup>22</sup> It is also significant that the attorney's fee is limited to 25 percent of *past-due* benefits, which is a critical departure from conventional assumptions concerning attorneys' fees.<sup>23</sup> For

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15. The author has discovered no statistics indicating how many claimants who have had their claims rejected by the ALJ seek counsel before going to, or seeking review by, the Appeals Council. Professor Dixon has learned and reported that about 20.5% of claimants appeared with attorneys before the ALJ in fiscal year 1970. R. DIXON, *supra* note 6, at 35. Since the claimants are fully advised of their prerogatives following an adverse decision of the ALJ, and since they have chosen to "go it alone" through a judicial-like hearing, it seems reasonable to assume that a substantial number of them will presume to process the less exacting Appeals Council procedures on their own as well.

16. *Landess v. Weinberger*, 490 F.2d 1187, 1188 (8th Cir. 1974).

17. 42 U.S.C. § 406(a) (1970); 20 C.F.R. § 404.972 (1976); H. MCCORMICK, *supra* note 2, at 376; Annot., 22 A.L.R. 3d 1081 (1968).

18. 42 U.S.C. § 406(a)-(b) (1970).

19. 42 U.S.C. § 406 (1970); *Hopkins v. Cohen*, 390 U.S. 530 (1968); *Redden v. Celebrezze*, 370 F.2d 373 (4th Cir. 1966).

20. 42 U.S.C. § 406(a)-(b) (1970).

21. *Id.*

22. *McKittrick v. Gardner*, 378 F.2d 872 (4th Cir. 1967).

23. 42 U.S.C. § 406(a)-(b) (1970); *Blankenship v. Gardner*, 256 F. Supp. 405 (W.D. Va. 1966).

example, in cases where the attorney is successful in establishing his client's entitlement to benefits from the Veterans Administration under National Service Life Insurance Policies, his fee, although limited to 10 percent, is payable in installments from future as well as past benefits.<sup>24</sup>

These fee limitations have been held constitutional, but not applicable retroactively.<sup>25</sup> The question whether an attorney was entitled to a fee of 25 percent of *all* benefits derivative from the client's claim (which would include benefits payable not only to the client but to his dependents as well, even though not parties) or only to 25 percent of the benefits payable to the client himself has been resolved in favor of the former rule, so that in this situation the attorney is entitled to the larger fee.<sup>26</sup> Therefore, when representing a social security claimant it is advisable to obtain a contingency fee contract granting to the attorney 25 percent of all past-due benefits due the claimant and any others (including wife, children, etc.) entitled to receive benefits on his account.<sup>27</sup> Although such an agreement is not binding on HEW, a copy should be sent to HEW to create a favorable record in support of the attorney's entitlement to the maximum allowable fee.<sup>28</sup>

Although the statutes and regulations permit a claimant to appoint someone other than a licensed attorney to represent him in a claims proceeding,<sup>29</sup> there is no provision in the law authorizing the payment of fees to such person. If such fees were arranged by contract, the legality and enforceability of such an arrangement would probably be governed by local law. In most jurisdictions, the legality, and therefore the enforceability, of such an arrangement would be questionable.<sup>30</sup>

The statute indicates an intention that the attorney be independently compensated for work before the SSA as distinguished from work before the courts.<sup>31</sup> Thus it has been held that a court, in awarding a fee, may take into account only the work which the attorney has done in connection with the judicial appeal.<sup>32</sup> If that amount is less than the maximum permitted under the statute, the attorney may seek additional compensation pursuant to an order from the Secretary of HEW for work done at the administrative level.<sup>33</sup> In no event, however, may the combined fees exceed the maximum

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24. See, e.g., *Moss v. United States*, 311 F.2d 462 (2d Cir. 1962).

25. *Randolph v. United States*, 274 F. Supp. 200 (M.D.N.C. 1967), *aff'd per curiam*, 389 U.S. 570 (1968) (constitutional); *Fenix v. Finch*, 436 F.2d 831 (8th Cir. 1971); *Gardner v. Mitchell*, 391 F.2d 582 (5th Cir. 1968) (not retroactive).

26. *Hopkins v. Cohen*, 390 U.S. 530 (1968).

27. H. MCCORMICK, *supra* note 2, at 381-82.

28. *Id.*

29. 42 U.S.C. § 406(a) (1970); 20 C.F.R. § 404.972(b) (1976).

30. 20 C.F.R. § 404.977 (b)(2) (1976). See, e.g., *Curry v. Dahlberg*, 341 Mo. 897, 110 S.W.2d 742 (1937) (semble).

31. *McDonald v. Weinberger*, 512 F.2d 144 (9th Cir. 1975); *contra Webb v. Richardson*, 472 F.2d 529 (6th Cir. 1972).

32. *McDonald v. Weinberger*, 512 F.2d 144 (9th Cir. 1975).

33. *Gardner v. Menendez*, 373 F.2d 488 (1st Cir. 1967).

permitted by statute, which is typically 25 percent of the past-due benefits.<sup>34</sup> It has been held that even if the Secretary has denied benefits and subsequently is reversed by the courts, it would be proper for the Secretary to authorize payment of a fee for services rendered during the unsuccessful attempt to secure payment at the administrative level. However, if the courts have authorized 25 percent of the past-due benefits as a fee for services before the courts, the statutory maximum would be reached and the Secretary could not independently approve or authorize additional compensation for work done at the administrative level.<sup>35</sup>

*Example 1:* Following 18 months of work within HEW, the Appeals Council denies your client's claimed benefits. On appeal to the district court, the Appeals Council is reversed and \$4000 in past-due benefits are ordered paid to the claimant. The court also allows a fee for services performed in making the judicial appeal of \$1000. This is the maximum amount authorized by statute, so HEW cannot authorize payment of an additional fee for services performed at the administrative stage.

*Example 2:* Some facts as in example 1, but the court only allows a fee of \$300 for services performed in processing the appeal. The attorney may request, and HEW may in its discretion authorize, a fee of up to \$700 for services performed at the administrative level.

The present fee system was inaugurated by amendments to the Social Security Act in 1968.<sup>36</sup> Although it is widely agreed that the amendments represent a vast improvement over the pre-1968 situation, the present formula has the obvious anomaly of penalizing the attorney who swiftly and diligently corrects a situation for his client. The past-due benefits in such a case will be much smaller than in the case where more time has elapsed between the making of the initial erroneous determination and its ultimate correction.<sup>37</sup>

A charge to the client of a fee in excess of the statutory maximum is punishable by a fine not exceeding \$500 or by imprisonment not exceeding one year, or both.<sup>38</sup>

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34. Dawson v. Finch, 425 F.2d 1192 (5th Cir.), cert. denied, 400 U.S. 830 (1970); contra Webb v. Richardson, 472 F.2d 529 (6th Cir. 1972).

35. Dawson v. Finch, 425 F.2d 1192 (5th Cir.), cert. denied, 400 U.S. 830 (1970).

36. Social Security Amendments of 1967, § 173, 42 U.S.C. §§ 405, 406 (1970).

37. The incentive to procrastination which the Social Security attorneys' fees system provides is trenchantly described in Blankenship v. Gardner, 256 F. Supp. 405, 410 (W.D. Va. 1966). See also S. JACOBY, LITIGATION WITH THE FEDERAL GOVERNMENT 44-45 (1970).

38. 42 U.S.C. § 406(a) (1970) ("services performed in connection with any claim before the Secretary"); 42 U.S.C. § 406 (b)(2) (1970) ("services rendered in connection with proceedings before a court"). Whether services rendered to a client are so proximately related to a "claim before the Secretary" or to "proceedings before a court" are questions of fact for the jury, so lawyers should think carefully about billings for services rendered to the client before making the actual claim

## FILING THE CLAIM

Mrs. Landess, like many other social security claimants, applied for disabled widow's benefits without retaining counsel. This occurred on July 24, 1970. It was not until December 9, 1974, however, that the SSA conceded her entitlement to benefits. She was granted benefits retroactive to the date of application, thus being assured of a monthly check for the remainder of her life.<sup>39</sup>

Mrs. Landess did not retain counsel until the very last step of the administrative process: the appeal from the decision of the Administrative Law Judge (hereinafter "ALJ") to the Appeals Council. This late entry of counsel precluded the development of the kind of evidence and record to support the conclusion that Mrs. Landess' problems were such as to preclude her "from engaging in any gainful activity."<sup>40</sup> As a result, the Eighth Circuit, in reversing both the district court and the SSA (which had denied benefits), was required to remand the case, ultimately to the SSA, for the purpose of developing such evidence.<sup>41</sup>

Before retaining her attorney, Mrs. Landess had, at most, two personal encounters with the bureaucracy charged with determining her status. The first encounter would have been when her claim was first filed. At this point she probably received advice and assistance from local SSA employees in what has been characterized as the "intake interview."<sup>42</sup> The second direct encounter between Mrs. Landess and the SSA probably did not take place until the hearing before the ALJ who ultimately denied her claim.<sup>43</sup>

Between these two encounters, however, a good deal of bureaucratic processing took place—processing which, as one distinguished observer has noted, "is hardly a model of simplicity."<sup>44</sup> At this point it will be useful to take a closer look at the processing of claims before moving on to an analysis of the formal appeals process.

## PRE-HEARING PROCEDURES IN DISABILITY CASES

The disability program under which Mrs. Landess filed her claim was instituted in 1956.<sup>45</sup> Basically the program advances the date—from the

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where such services are arguably related to the claim itself. *United States v. Lewis*, 235 F. Supp. 220 (E.D. Tenn. 1964).

39. Letter from co-author James R. Reynolds to co-author Frederick Davis, May 3, 1975. The date of the decision of the court of appeals was February 12, 1974, indicating an elapse of ten months between date of remand and the date upon which the SSA conceded entitlement. *Landess v. Weinberger*, 490 F.2d 1187 (8th Cir. 1974).

40. 42 U.S.C. § 423(d)(2)(B) (1970).

41. *Landess v. Weinberger*, 490 F.2d 1187, 1189-90 (8th Cir. 1974).

42. R. DIXON, *supra* note 6, at 25.

43. *Landess v. Weinberger*, 490 F.2d 1187, 1188 (8th Cir. 1974); R. DIXON, *supra* note 6, at 33.

44. R. DIXON, *supra* note 6, at 24.

45. Social Security Amendments of 1956, § 103, 42 U.S.C. § 423 (1970).

statutory age requirement to the date of disablement—at which a worker or the widow of a covered worker can begin to receive retirement payments. Mrs. Landess was widowed in 1969 at the age of 48. Her husband was a covered worker. Normally Mrs. Landess would not have been eligible for social security retirement benefits until she reached the age of 62, or 65; however, if disabled, and over the age of 50, her eligibility would have vested on the death of her husband. The critical question, therefore, in the thousands of cases similar to that of Mrs. Landess, is the “level of severity” of the “physical or mental impairment” which “is deemed sufficient to preclude an individual from engaging in any gainful activity.”<sup>46</sup>

The procedures for processing disability claims differ from those applicable to other programs administered by the SSA—most significantly in the program’s utilization of state agencies in the determination process.<sup>47</sup> The pre-hearing procedures break down into four major stages, although only one (the first) normally involves a face-to-face encounter between the claimant and government employees.<sup>48</sup>

(1) *Claim intake*. This describes the visit by the claimant to one of the 800 or so SSA offices to file the claim. Typically this stage involves an interview and, although medical data is not marshalled, the person interviewing the claimant records his personal observations. If there is any question of *coverage*, the claim is sent to SSA headquarters for appraisal, and, if coverage is denied, the claimant is so advised. At that stage, the dispute would appear to be ripe for judicial review. Absence of coverage has been labelled a “nonsubstantive” or “technical” ground for denial of benefits. All other cases follow the following procedures.<sup>49</sup>

(2) *Initial state agency review*. With respect to disability claims (claims based upon the assertion that, because the claimant is disabled from pursuing gainful employment, his or her retirement benefits should begin to run from the date of disability rather than from the statutory retirement age), the statutory procedures involve a unique pre-condition: evaluation of the claim by a state agency.<sup>50</sup> Whatever the political considerations may have been for providing for such a procedure, it involves only nominal state participation, because the state agency involved (in Missouri, the Division of Vocational Rehabilitation within the Department of Elementary and Secondary Education) is 100 percent federally funded and operates under SSA guidelines.<sup>51</sup>

The state agency does not hold hearings. Instead, it marshalls medical data, a process which begins immediately following the filing of the claim

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46. 42 U.S.C. § 423(d)(2)(B) (1970).

47. R. DIXON, *supra* note 6, at 26-28.

48. *Id.* at 25.

49. *Id.* at 26.

50. 42 U.S.C. § 421(a) (1970).

51. 42 U.S.C. § 421(e) (1970); R. DIXON, *supra* note 6, at 26; OFFICIAL MANUAL OF THE STATE OF MISSOURI 394-95 (1975-1976).



with the SSA district office.<sup>52</sup> The state agency, utilizing a two-man team consisting of a physician and a specialist in disability evaluation, evaluates the medical data in the file and may order a "consultive medical examination" to be made by a private physician chosen from a federally approved list.<sup>53</sup> The state agency either may approve or deny the disability claim. In either case the matter is ready for stage three.

(3) *Review by SSA's Bureau of Disability Insurance (hereinafter "BDI").* Whether denied or approved, the state agency decision and file are forwarded to BDI headquarters in Baltimore, Maryland, for review. BDI may not reverse state agency denials of disability, but may, if it wishes, "negotiate" with the state agency with respect to the denial. However, this occurs in less than 1 percent of the cases.<sup>54</sup>

It would be a mistake to assume that *all* of the state agency decisions are reviewed at this stage. Although BDI must certify all disability determinations, it in fact reviews only a small percentage of the files it receives.<sup>55</sup> Thus, it would appear that a state agency approval of disability has a very high statistical chance of achieving legal finality at this point.

(4) *Reconsideration.* At this point it must be remembered that all claims have been allowed except for (a) those refused by the State Division of Vocational Rehabilitation and (b) those claims denied by BDI from the small percentage which it undertakes to review (less than 2 percent of the claims initially allowed by the state agency).<sup>56</sup> Still, the denials amount to approximately 45 percent of the claims actually processed. A denial becomes final after a period of six months unless the claimant requests a reconsideration.<sup>57</sup>

The reconsideration request results in a rerun of stages 2 and 3 described above. The only difference on the second time around appears to be a more careful and deliberate appraisal of the documentary materials advanced in support of the disability claim.<sup>58</sup> Moreover, under the so-called "open file-continuing claim" concept the claimant is permitted to submit at any time additional material supporting his claim, so that, on the second

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52. The immediate involvement of the state agency in the appraisal and collection of medical data bearing upon the question of the claimant's disability was a change in procedure inaugurated in 1971. R. DIXON, *supra* note 6, at 25.

53. *Id.* at 27.

54. *Id.* at 29.

55. *Id.* at 28.

56. *Id.* at 31.

57. For fiscal year 1970, using round numbers, there were about 600,000 state determinations submitted to BDI. Under a new technique, only about 5% of these (roughly 30,000) are actually reviewed by BDI. About 5,000 of these are denials which the state agency is talked into allowing, although BDI has no actual power to reverse a state agency denial. About 6,000 of the allowances are changed to denials by BDI. The ratio of the number of processed denials to processed approvals is only slightly higher than the overall ratio of approvals to denials (330,000 to 270,000). R. DIXON, *SOCIAL SECURITY DISABILITY AND MASS JUSTICE* 31 (1973).

58. *Id.* at 32.

time around, the file may contain more persuasive evidence in support of the claim.<sup>59</sup> It also should be noted that at no point during the reconsideration phase is the claimant entitled to any kind of a hearing or face-to-face interview, although a leading commentator has suggested that such an encounter might be feasible.<sup>60</sup>

#### THE ADMINISTRATIVE HEARING

During 1970 about 70 percent of the reconsidered denials of disability claims were again denied.<sup>61</sup> At this point all such claimants are entitled to have the merits of their claims heard by an Administrative Law Judge. They have six months from the date of the mailing of the notice of denial in which to assert that right.<sup>62</sup> This is the first occasion in which the claimant may have an opportunity for what has been called a "face-to-face" ventilation of his claim before a clearly identified person with authority to rule in his favor. The ALJ who hears the claimant's case is assigned to the case by the SSA's Bureau of Hearings and Appeals.<sup>63</sup>

Whether the ALJ in fact enjoys a status which ensures the desirable impartiality and objectivity commonly expected of a true judge is a matter of some debate.<sup>64</sup> Nevertheless the hearing partakes of a judicial atmosphere and, were it not for the fact that the statutes and regulations provide for identical procedural safeguards, the hearing would arguably be subject to the provisions of the Federal Administrative Procedure Act applicable to trial-type hearings.<sup>65</sup>

It is unnecessary for the claimant to be represented by an attorney at this hearing, and in fact a large number of claimants go unrepresented at this stage.<sup>66</sup> Mrs. Landess was one of this group and her experience underscores the hidden costs of an adjudicative proceeding undisciplined due to the absence of legal skills.<sup>67</sup>

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59. "A unique feature of the appeals process is that at each level the case is considered on the factual record then developed. The record is not closed at any prior level." Smith, *supra* note 14, at 14-15.

60. R. DIXON, *supra* note 57, at 33.

61. *Id.* at 34.

62. 20 C.F.R. § 404.918 (1976).

63. R. DIXON, *supra* note 57, at 34; Smith, *supra* note 14, at 16; Hayes, *Social Security Disability and the Administrative Law Judge*, AIR FORCE L. REV., Spring 1975, at 73, 76.

64. A summary of the controversy concerning alleged utilization of institutional pressures on the ALJ can be found in R. DIXON, *supra* note 57, at 42-48. For an outstanding analysis of the differences in procedural protections afforded claimants where the hearing is before someone other than an ALJ, see Comment, *Social Security Hearings for the Disabled—Who Decides: Trial Examiners or Administrative Law Judges?*, 69 NW. U. L. REV. 915 (1975).

65. Richardson v. Perales, 402 U.S. 389, 409-10 (1971).

66. R. DIXON, *supra* note 57, at 35; Smith, *Social Security Appeals in Disability Cases*, 28 ADMIN. L. REV. 13, 14 (1976).

67. The critical holding in *Landess* was that the failure of the ALJ to take action which would have better allowed the claimant to develop her case meant that

The unique aspect of most HEW hearings, including those involving disability claims, is the absence of an independent attorney representing the government.<sup>68</sup> The result is that there is no *lis inter partes* as is found at hearings before most other federal agencies.

The ALJ in the HEW case typically assumes three roles. He functions as a government advocate and often will summon a vocational specialist and a medical adviser to attend the hearing and provide evidence.<sup>69</sup> Where the ALJ has independently acquired knowledge about medical facts and disability conditions, the cases are divided whether he can rely on such information in deciding a case against the claimant.<sup>70</sup> In addition to serving as a government advocate, the ALJ (where the claimant is unrepresented) also must assist the claimant in the development of the claimant's case. This responsibility is alluded to in unmistakable terms in *Landess*:

[O]ur recent decisions have made it clear that the [Administrative Law Judge] has a duty to fairly and fully develop the matters at issue . . . . The administrative law judge in social security cases is in the peculiar position of acting as an adjudicator while also being charged with developing the facts . . . . This is especially true when the claimants appear without counsel.<sup>71</sup>

Finally, as well illustrated by the excerpted language above, the ALJ must decide the case. Thus, it is fair to say that the ALJ in fact wears *three hats*. He must see to it that the fisc is protected against unfounded claims, he is charged with a positive obligation to make certain that the unrepresented claimant's case is fully developed, and he ultimately must decide a genuine dispute concerning entitlement.

Normally there is no court reporter at the hearing and the proceedings are preserved through an "open mike" tape recording.<sup>72</sup> Written transcripts are prepared only in the event of a judicial appeal or an appeal to the Appeals Council.<sup>73</sup> A decision is mailed to the party at his last known address and is required to contain findings of fact and a statement of reasons.<sup>74</sup>

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the Secretary's decision could not be said to be supported by substantial evidence. Although the Secretary ultimately conceded eligibility without the necessity of a second hearing, a replay of the entire adjudicative process involved in the case could easily have followed. *Landess v. Weinberger*, 490 F.2d 1187, 1190 (8th Cir. 1974).

68. R. DIXON, *supra* note 57, at 37.

69. *Id.* at 35-36; Hayes, *supra* note 63, at 77.

70. Compare *Cook v. Celebrezze*, 217 F. Supp. 366 (W.D. Mo. 1963) and *Glendenning v. Ribicoff*, 213 F. Supp. 301 (W.D. Mo. 1962) with *Rinaldi v. Ribicoff*, 305 F.2d 548 (2d Cir. 1962).

71. *Landess v. Weinberger*, 490 F.2d 1187, 1189 (8th Cir. 1974).

72. Smith, *supra* note 66, at 16.

73. *Id.*; 20 C.F.R. § 404.931 (1976).

74. 20 C.F.R. § 404.939 (1976).

## THE APPEALS COUNCIL

Before the decision of the ALJ may be appealed to federal district court, the claimant must file a request for review with the Appeals Council. This request must be filed within 60 days from the mailing of the decision of the ALJ.<sup>75</sup>

The Appeals Council may or may not grant the request for review.<sup>76</sup> If the request is denied, the dispute is ready for judicial review.<sup>77</sup> If the request is granted, however, the claimant has a right to appear before the Appeals Council and to file briefs.<sup>78</sup> Even at this stage of the proceedings the so-called "open file" rule obtains. The claimant may supplement his file with new evidence and new testimony in support of his disability claim before the ALJ.<sup>79</sup> Similarly, if a request for review is granted by the Appeals Council, the claimant may supplement his file and record with new evidence, exhibits, and testimony.<sup>80</sup> If the Appeals Council again denies the claim, this decision automatically becomes the decision of the Secretary, and the case is ready for judicial review.<sup>81</sup>

In addition to the foregoing, there are two other ways in which controversies can come before the Appeals Council. If the ALJ believes the cause merits it, he may certify the matter to the Appeals Council for decision.<sup>82</sup> The Appeals Council, in addition, has the power (although rarely exercised) to assert jurisdiction over a decision on its own motion without the need for either the claimant or the ALJ to invoke that jurisdiction.<sup>83</sup>

The Appeals Council consists of 13 persons, including a Chairman and a Vice-Chairman.<sup>84</sup> The jurisdiction of the Council is exercised, however, by a panel of only two members, which means that the ALJ's decision is subject to revision or reversal by persons who may or may not have the same judicial qualifications as the ALJ who heard the case in the first instance.<sup>85</sup> The panel's decision typically becomes the decision of the Appeals Council, and therefore that of the Secretary.<sup>86</sup>

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75. *Id.* § 404.946.

76. *Id.* § 404.947.

77. *Id.* § 404.940.

78. *Id.* §§ 404.942, 948; Smith, *supra* note 66, at 17.

79. 20 C.F.R. § 404.940 (1976); R. DIXON, *supra* note 57, at 33.

80. 20 C.F.R. § 404.943 (1976); R. DIXON, *supra* note 57, at 33.

81. 20 C.F.R. § 404.951 (1976).

82. *Id.* § 404.939; R. DIXON, *supra* note 6, at 42.

83. 20 C.F.R. § 404.941 (1976); R. DIXON, *supra* note 57, at 42; Smith, *supra* note 66, at 15, 24. For an example of one of the rare instances in which the Appeals Council certified a case from the ALJ on its own motion see *Sosna v. Celebrezze*, 234 F. Supp. 289 (E.D. Pa. 1964).

84. R. DIXON, *supra* note 57, at 42.

85. The controversy concerning the relationship between the ALJ and the panels of the Appeals Council to which his decisions are subject to review is fairly and trenchantly summarized in R. DIXON, *supra* note 57, at 42-48.

86. 20 C.F.R. § 404.951 (1976); R. DIXON, *supra* note 57, at 46.

The most controversial function of the Appeals Council, however, is one as yet unmentioned. The Appeals Council may remand the case to the ALJ for rehearing or for the taking of additional testimony, and, in addition, may remand the decision for a review of technical errors or other shortcomings which the ALJ may wish to correct.<sup>87</sup> The decision to remand, however, is often made under the de facto power of a relatively anonymous person called the Regional Hearing Representative (RHR). Despite the SSA's disclaimer of the exercise of internal pressure upon the ALJs to make their decisions more consistent with agency policy, misgivings persist concerning an arrangement which at least permits the risk that internally generated bureaucratic pressure will be brought to bear on the sacred impartiality of the ALJs.<sup>88</sup>

### JUDICIAL REVIEW

When the Appeals Council denies a claimant's request for review of an adverse determination by the ALJ, or where the decision by the Appeals Council after review is once again adverse to the claimant, the claimant has exhausted his administrative remedies and the case is ripe for judicial review. The procedure for review is what has been called "statutory review" because Congress has provided by statute the procedure to be followed in challenging HEW decisions in this area.<sup>89</sup>

Appeals from HEW decisions are, however, unique types of "statutory review" for two reasons: (1) the normal method of federal statutory review is an appeal to a federal court of appeals,<sup>90</sup> whereas in HEW cases the appeal is to the federal district court;<sup>91</sup> and (2) the normal statutory review procedure provides for an action against the particular federal agency or the United States,<sup>92</sup> whereas in HEW cases the action must be brought against the Secretary of HEW.<sup>93</sup>

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87. R. DIXON, *supra* note 57, at 43, 46.

88. *Id.* at 42-48.

89. 42 U.S.C. § 405(g) (1970).

90. B. SCHWARTZ, *ADMINISTRATIVE LAW* 430-32 (1976). At least twenty federal statutes provide for judicial review of agency decisions in the court of appeals in the form of an action against the agency. The prototype is generally agreed to be the Federal Trade Commission Act, § 5, 15 U.S.C. § 45(c) (1970). B. SCHWARTZ, *supra* note 90, at 431; K. DAVIS, *ADMINISTRATIVE LAW: CASES, TEXT, PROBLEMS* 442 (1965).

91. 42 U.S.C. § 405(g) (1970).

92. Even under the so-called Urgent Deficiencies Act, which established the unique procedures applicable to review of orders of the Interstate Commerce Commission, and which provided for such review in a three-judge federal district court, the United States rather than the individual officer was the named defendant. Urgent Deficiencies Act, ch. 32, 38 Stat. 219 (1913). That anomaly has now been repealed. Act of Jan. 2, 1975, § 5, 28 U.S.C. § 2321 (Supp. V 1975). The Hobbs Act which, as amended, prescribes the procedures for review of orders of six agencies in the courts of appeals, nevertheless states: "The action shall be against the United States." Act of Sept. 6, 1966, § 4(e), 28 U.S.C. § 2344 (1970). *See* note 90 *supra*.

93. 42 U.S.C. § 405(g) (1970).

The second unique aspect is of no particular significance, especially since the statutory change which allows automatic substitution of parties in the event that the office changes during litigation.<sup>94</sup> However, the first aspect is of some significance because it imposes an additional layer of review on most HEW decisions, which is both duplicative and wasteful. Thus, Mrs. Landess' case was heard once in federal district court<sup>95</sup> and once again in the federal court of appeals,<sup>96</sup> whereas if she had been appealing a decision of the Federal Trade Commission<sup>97</sup> or the Federal Communications Commission,<sup>98</sup> her case would have gone directly to the federal court of appeals. Moreover, the court of appeals was required to remand the case first to the district court which would then return it to HEW. While such a procedure is doubtless automatic in such cases, the circuitousness is difficult to defend.

The critical ritual term in determining the power of appellate court to substitute its judgment for that of the agency is the "substantial evidence rule," which declares that the decision of the agency may be held unlawful if "unsupported by substantial evidence . . . on . . . the whole record."<sup>99</sup> The evolution of that rule, the controversies concerning the propriety of its application to different types of disputes, and the extent to which it gives to the appellate courts more or less power than other formulas for review, are matters too complex for consideration here.<sup>100</sup> For present purposes it is sufficient to note that this is the formula used by the courts in reviewing HEW decisions.<sup>101</sup>

More important than the rule, however, is the technical question concerning the qualities of the evidence necessary to comply with the "substantial" label. Many states impose a "competency" requirement in addition to the substantiality requirement imposed by federal law, thereby making the decisions of the agency reversible if not supported by competent as well as substantial evidence on the whole record.<sup>102</sup> Since "compe-

94. FED. R. CIV. P. 25(d)(1).

95. *Landess v. Weinberger*, 361 F. Supp. 247 (E.D. Mo. 1973).

96. *Landess v. Weinberger*, 490 F.2d 1187 (8th Cir. 1974).

97. 15 U.S.C. § 45(c) (1970).

98. 28 U.S.C. § 2344 (1970).

99. The quotation in the text is an excerpted portion of the judicial review section of the Federal Administrative Procedure Act. 5 U.S.C. § 706 (1970). The words excerpted were given particular significance as a result of Mr. Justice Frankfurter's authoritative interpretation of that language in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

100. An enlightening treatment of the policy issues affecting the formulas for review, their limitations, and the realities of their applications can be found in W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW, CASES AND COMMENTS* 378-407 (6th ed. 1974).

101. 42 U.S.C. § 405(g) (1970); *Richardson v. Perales*, 402 U.S. 389, 409 (1971) (semble); *Johnson v. Weinberger*, 525 F.2d 403, 407-08 (7th Cir. 1975).

102. *E.g.*, MO. CONST. art. 5, § 22; MO. R. CIV. P. 100.07(b)(3); § 536.140.2(3), RSMO 1969.

tent" means the type of evidence admissible in a civil action before ordinary courts of general jurisdiction, medical reports and recorded observations of those who have examined or who have had dealings with the claimant cannot be relied upon by the reviewing court unless subject to some exception to the hearsay rule.<sup>103</sup>

Although it was generally believed that federal appellate review of federal agency decisions was not governed by a competency requirement unless specifically provided by statute or rule,<sup>104</sup> that issue came before the United States Supreme Court in *Richardson v. Perales*.<sup>105</sup> That case involved the question whether medical reports by physicians who had not testified or appeared at the hearing which dealt with the question of the claimant's disability might nevertheless supply the substantial evidence necessary to uphold a decision adverse to the claimant. In holding that such reports could be considered as at least part of the substantial evidence necessary to validate the administrative denial of the claim, the Supreme Court laid to rest any doubts about a competent evidence requirement for the validity of federal administrative decisions involving trial-type hearings, at least in the absence of a specific statutory or substantive rule imposing such a requirement.<sup>106</sup>

From the standpoint of Mrs. Landess' claim, the *Perales* decision could hardly be looked upon as favorable. The Landess file contained medical reports contradicting the claimant's assertion of disability. Even though claimant's theory was supported by post-hearing medical reports available to the Appeals Council under the "open file" rule, it would be difficult to say that the evidence upon which the ALJ and the Appeals Council based their decisions was unsubstantial.<sup>107</sup> The *Perales* rule permits reliance on reports otherwise objectionable as hearsay. The district court, after a comprehensive appraisal of the evidence and the record, reached the conclusion that the evidence upon which the decision below had been made was substantial.<sup>108</sup>

On appeal, three points were emphasized. Even though *Perales* approved administrative decisions based upon medical reports submitted by examining physicians as well as non-examining physicians who were not present at the hearing, it was argued that there is a difference between

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103. See, e.g., *Barnes v. State Dep't of Public Health & Welfare*, 320 S.W. 2d 88 (K.C. Mo. App. 1959).

104. *American Rubber Prods. Corp. v. NLRB*, 214 F.2d 47 (7th Cir. 1954). See also *Peters v. United States*, 408 F.2d 719 (Ct. Cl. 1969).

105. 402 U.S. 389 (1971).

106. *Id.*

107. The federal district court opinion in *Landess* amounts to little more than a lengthy and carefully marshalled record of all of the evidence which the ALJ and the Appeals Council had before them. On balance, the district court concluded, it could not be said that the decisions below were not supported by substantial evidence. *Landess v. Weinberger*, 361 F. Supp. 247 (E.D. Mo. 1973).

108. *Id.*

medical reports prepared by non-examining physicians and those made by examining physicians, and that the former should not be given as much weight as the latter. It was also argued that although reports which might be hearsay in a civil action may provide the substantial evidence necessary to uphold the decision in an administrative proceeding, such a rule does not exonerate the courts from the duty of closely scrutinizing such hearsay in order to assure justice. Finally, it was contended that although additional information relative to the claimant's disability was available to the Appeals Council under the "open file" rule, the relevance of this information to the issue whether this disability precluded her from engaging in any "gainful activity" was a matter which she should be permitted to develop in her case before the ALJ.

The court of appeals seemed to accept all three of these arguments. As to the difference between reports of examining physicians and non-examining physicians (in this case, two medical advisors called into the case by the ALJ), the court declared:

In the present case the Secretary has relied on reports of certain medical advisers to determine that the claimant is not disabled from engaging in any gainful activity under the Act. We think these written reports, without personal examination of the claimant, deserve little weight in the overall evaluation of disability. The advisers' assessment of what other doctors find is hardly a basis for competent evaluation without a personal examination of the claimant.<sup>109</sup>

As to the special responsibility to evaluate the otherwise admissible and probative hearsay under the *Perales* rule, the court said:

Although the law recognizes that written medical reports are admissible in a social security hearing and may be the sole basis for substantial evidence to support a social security determination *agency adjudicators and courts cannot ignore their inadequacies*. Experience within our adversary trial system has long demonstrated that naked conclusions and opinions by medical experts are often subject to reserved and unwritten qualifications requiring searching evaluation. Medical diagnosis is seldom an exact science. However, since expediency is deemed an important consideration in processing social security claims [with a footnote reference to the *Perales* case] the Secretary and reviewing courts must closely scrutinize the evidence to avoid miscarriages of justice.<sup>110</sup>

Finally, with respect to the need to evaluate in a single proceeding the multiple disabling conditions and their combined effect on capacity to engage in a gainful activity, the court said:

In evaluating whether a claimant is capable of engaging in any gainful activity it is essential that the Secretary view the individual as a whole. It is senseless to view several disabilities as isolated

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109. *Landess v. Weinberger*, 490 F.2d 1187, 1189-90 (8th Cir. 1974).

110. *Id.* at 1189 (emphasis added).



from one another as the medical advisers did here. Each illness standing alone, measured in the abstract, may not be disabling. But disability claimants are not to be evaluated as having several hypothetical and isolated illnesses. These claimants are real people and entitled to have their disabilities measured in terms of their total physiological well-being . . . . To attempt to evaluate disability without personal examination of the individual and without evaluation of the disability as it relates to the particular person is medical sophistry at its best.<sup>111</sup>

#### CONCLUSION

Social security disability cases involve a complex structure of inter-related characterizations which make their processing uniquely delicate and demanding. Fee arrangements are not nearly as simple as in the normal civil case, and there are strict restrictions. The "open file" rule allows continual modification of the record which, in turn, distorts the review process. One commentator has suggested that it might be wiser, where additional medical evidence has become available, to institute an entirely new claim so that the new evidence will be available to first-instance decision makers who may react more sympathetically to it than the post-hearing reviewers.<sup>112</sup> The experience of the *Landess* case seems to underscore the wisdom of the foregoing suggestion.

The internal operations of the SSA indicate that the ALJ may not be quite as free from institutional influences as his title suggests. This is also a matter to be considered when preparing or considering an appeal.

Although the *Perales* case would indicate that claimants may not easily overcome adverse HEW decisions on the ground that the evidence is not substantial, *Landess* suggests some limitations on that rule which may be of encouragement to claimants and their attorneys. The *Landess* case indicates that although the burden is on the claimant to establish both disability and an inability to engage in a gainful activity resulting therefrom, a failure on the part of the ALJ to afford the claimant a full opportunity to develop a case permitting such a determination is legal ground for a remand of that case.<sup>113</sup>

The case also indicates that the government, if it wishes to establish no entitlement, must adduce evidence in a single proceeding showing that a series of conditions, even in combination, do not produce an inability to engage in a gainful activity.<sup>114</sup>

Finally, the *Perales* rule that evidence incompetent for purposes of admissibility in judicial proceedings may be substantial enough to uphold an administrative decision was qualified in *Landess*. That qualification

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111. *Id.* at 1190.

112. Smith, *supra* note 66, at 23-24.

113. *Landess v. Weinberger*, 490 F.2d 1187 *passim* (8th Cir. 1974).

114. *Id.*

requires a distinction between medical reports made by non-testifying physicians who have examined the claimant and reports made by non-testifying physicians who have not examined the claimant. The qualification also requires that evidence normally incompetent, but admissible on the basis of administrative expediency, be carefully scrutinized where significant personal interests are at stake.<sup>115</sup>

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115. *Id.* at 1189.

