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REPRESENTATION AND ADVOCACY AT NON- ADVERSARY HEARINGS: THE NEED FOR NON-ADVERSARY REPRESENTATIVES AT SOCIAL SECURITY DISABILITY HEARINGS

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During the past decade a great deal of attention has been paid to the decisionmaking process for Social Security disability programs.¹ Both

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1. The Old Age, Survivors, and Disability Insurance Benefits program (OASDI), 42 U.S.C. §§ 401-432 (1976), provides for the payment of disability benefits to insured wage earners. *Id.* § 423. The program also provides for the payment of secondary benefits to certain disabled dependents of wage earners. *See, e.g., id.* § 402(e)(1)(B) (disabled widow); *id.* § 402(f)(1)(B) (disabled widower). In addition, since 1974 uninsured disabled persons and disabled insured wage earners with low monthly benefits may be eligible for Supplemental Security Income (SSI) benefits, depending on need. *Id.* §§ 1381-1383(c).

The disability requirements for insured wage earners through the OASDI program and for all persons through the SSI program are identical. *See* text accompanying notes 22-41 *infra*. The disability requirement for secondary benefits is somewhat more strict. *See* 42 U.S.C. § 423(d)(2)(B) (1976). No distinctions need be drawn among these various types of disability benefits for the purposes of this Article. Unless indicated otherwise, the term "disability benefits" is applied to all OASDI and SSI disability benefits. OASDI and SSI benefits are also paid on the basis of old age, *id.* §§ 402(a), 1382(a)(1), and blindness, *id.* §§ 423(d)(1)(B), 1382(a)(1). Disability determinations are far more complex, however, and therefore have been the subject of most concern about the determination process. Although this Article deals only with Social Security disability determinations, similar concerns exist relative to other Social Security eligibility issues, and non-adversary eligibility determinations in other similar social programs. *See, e.g.,* Popkin, *The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs*,

houses of Congress and the Social Security Administration have considered numerous proposals to improve the disability determination process.² Many of the proposals were based on studies or critiques of the non-adversary system for determining eligibility that has been used since disability benefits were added to the Social Security program in 1956.³ The entire disability determination process is non-adversary because Social Security Administration personnel are expected to assist claimants who generally are unrepresented;⁴ most debate concerning the future of the non-adversary process and the value of representation in the process, however, has focused on the administrative hearing stage.⁵

Two sets of statistics have raised doubts concerning the efficiency

62 CORNELL L. REV. 989, 993-1004 (1977) (study includes Federal Employees' Compensation Act and Veterans Disability Program, as well as Social Security).

2. The most recent congressional inquiry into the disability determination process resulted in the enactment of a number of reforms included in the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, §§ 304-312, 94 Stat. 441, 453-460 (1980) [hereinafter cited as 1980 Amendments]. See note 44 *infra* and text accompanying notes 103-08 *infra*. The Social Security Administration of the Department of Health and Human Services (formerly Health, Education and Welfare (HEW)) recently proposed and then withdrew an experiment to provide representatives for the government at Social Security hearings when claimants were represented by counsel. 45 Fed. Reg. 2345, 47162 (1980). See text accompanying notes 196-204 *infra*. For earlier indications of congressional concern, see, e.g., STAFF OF SUBCOMM. ON SOCIAL SECURITY, HOUSE COMM. ON WAYS AND MEANS, 94TH CONG., 1ST SESS., RECENT STUDIES RELEVANT TO THE DISABILITY HEARINGS AND APPEALS CRISIS (Comm. Print 1975) [hereinafter cited as RECENT STUDIES]; STAFF OF SUBCOMM. ON SOCIAL SECURITY, HOUSE COMM. ON WAYS AND MEANS, 95TH CONG., 2D SESS., DISABILITY ADJUDICATION STRUCTURE (Comm. Print 1978) [hereinafter cited as DISABILITY ADJUDICATION STRUCTURE]; STAFF OF SENATE COMM. ON FINANCE, 96TH CONG., 1ST SESS., ISSUES RELATED TO SOCIAL SECURITY ACT DISABILITY PROGRAMS 22-56 (Comm. Print 1979) [hereinafter cited as ISSUES RELATED TO DISABILITY PROGRAMS].

3. Recent studies that cover many areas considered during the deliberations over the 1980 Amendments, *supra* note 2, include: STAFF OF SUBCOMM. ON SOCIAL SECURITY, HOUSE COMM. ON WAYS AND MEANS, 96TH CONG., 1ST SESS., SOCIAL SECURITY ADMINISTRATIVE LAW JUDGES: SURVEY AND ISSUE PAPER (Comm. Print 1979) [hereinafter cited as SURVEY AND ISSUE PAPER]; J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARTZ, P. VERKUIL & M. CARROW, SOCIAL SECURITY HEARINGS AND APPEALS (1978) (National Center for Administrative Justice study authorized and funded by the Social Security Administration) [hereinafter cited as J. MASHAW, *et al.*]. Other related studies include: R. DIXON, SOCIAL SECURITY DISABILITY AND MASS JUSTICE—A PROBLEM IN WELFARE ADJUDICATION (1973); Popkin, *supra* note 1.

Congressional concern about the disability determination process continues. The Conference Report on the 1980 Amendments calls for a review of the entire process by the National Commission on Social Security. H.R. REP. NO. 944, 96th Cong., 2d Sess. 61 (1980) [hereinafter cited as 1980 Conference Report].

4. See generally text accompanying notes 47-69 *infra*. See also Richardson v. Perales, 402 U.S. 389, 403 (1971).

5. See studies cited in notes 2 and 3 *supra*. See also Champagne & Danube, *An Empirical*

and accuracy of the disability determination process: the high rate of reversals after hearings by administrative law judges, which tends to show that claims are not developed properly by Administration personnel at the initial stages of the process,⁶ and the large number of cases remanded for further consideration by the federal courts, which tends to show that claims are not adjudicated properly by administrative law judges.⁷

Some reversals by administrative law judges are necessary because of the presentation of evidence of a new condition that did not exist at the time of the earlier decision.⁸ Most of these reversals and remands are

Analysis of Decisions of Administrative Law Judges in the Social Security Disability Program, 64 GEO. L.J. 43 (1975).

6. During the 1979 fiscal year 57% of all OASDI disability decisions and 53% of all concurrent OASDI and SSI disability decisions brought to hearing were reversed by administrative law judges. OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION, U.S. DEP'T OF HEW, OHA FACT SHEET FOR FISCAL YEAR 1979 at 2 (1980) [hereinafter cited as 1979 FACT SHEET]. Although the reversal rate is only approximately 33% in non-disability determinations, *id.*, at least 75% of all hearing requests received in the 1979 fiscal year involved disability determinations. [1979] SOCIAL SECURITY ADMIN. ANN. REP. 59 (percentage approximate because SSI requests not separated by basis of eligibility). *See also* note 86 *infra*. Since these figures relate only to those decisions brought to hearing, the reversal rate is slight relative to the total number of claims denied. *See Mathews v. Eldridge*, 424 U.S. 319, 346 n.29 (1976).

A related concern is the extreme variation in the reversal rates of individual administrative law judges and in the general quality of their decisions. *See generally* R. DIXON, *supra* note 3, at 76; Champagne & Danube, *supra* note 5 (study shows no significant correlation between judge's background and attitudes, and reversal rate); Chassman & Rolston, *Social Security Disability Hearings: A Case Study in Quality Assurance and Due Process*, 65 CORNELL L. REV. 801 (1980) (analysis of recently implemented quality assurance system designed to identify and correct serious errors in determining disability by administrative law judges, evaluated on the record developed at the hearing). *See also* note 78 *infra*.

Presently, all OASDI and SSI hearings are held by federal administrative law judges (ALJs) assigned to the Social Security Administration's Office of Hearings and Appeals. These cases were heard by Hearing Examiners, and the change was made not without controversy. *See generally* Crampton, *Title Change for Federal Hearing Examiners? "A Rose by Any Other Name . . ."*, 40 GEO. WASH. L. REV. 918 (1972); Rosenblum, *The Administrative Law Judge in the Administrative Process: Interrelations of Case Law with Statutory Factors in Determining ALJ Roles*, reprinted in RECENT STUDIES, *supra* note 2, 171 at 205-30; Comment, *Social Security Hearings for the Disabled—Who Decides?: Trial Examiners or Administrative Law Judges?*, 69 NW. U.L. REV. 915 (1975). The title administrative law judge is used in this Article unless it appears otherwise in quotation.

7. In the 1979 fiscal year more than 40% of all OASDI and SSI cases filed in the federal district courts resulted in a remand for further administrative proceedings and less than 10% were reversed outright. 1979 FACT SHEET, *supra* note 6, at 4.

8. Evidence of a new disabling condition and new evidence of a preexisting condition can be presented for the first time at the hearing. *See generally* text accompanying notes 41-64 *infra*. *See also* note 10 *infra*.

necessary, however, because records are not developed properly during the initial stages of the process and are not completed at the administrative hearing.⁹ The fact that claimants have no opportunity to meet face-to-face with a decisionmaker and receive little or no assistance in developing their evidence of disability prior to hearing may also contribute to the high reversal rate of administrative law judges. Nevertheless, the high reversal rate is strong evidence of serious deficiencies in the prehearing stages of the process.¹⁰ Similarly, federal judges who hear relatively few disability cases and who have no opportunity to compare the records before them to others that had been approved earlier in the process may be disinclined to foreclose eligibility for claimants on appeal.¹¹ The high remand rate by federal courts and the courts' reasoning for these remands, however, show that administrative law judges are unable to remedy the deficiencies of the prehearing process at the hearing.

The purpose of this Article is to examine the non-adversary structure of the disability determination process, identify its major limitations, and explore the role, if any, for representation and advocacy in this setting, particularly at the administrative hearing stage. Under the cur-

9. A 1977 study found that disability determinations were being made without evidence being properly developed both before and at the administrative hearing level. CENTER FOR ADMINISTRATIVE JUSTICE, THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM (1977), reprinted in DISABILITY ADJUDICATION STRUCTURE, *supra* note 2, at 48 [hereinafter cited as SOCIAL SECURITY HEARING SYSTEM] (summary and conclusions of report later published by Professor Mashaw and others, see J. MASHAW, *et al.*, *supra* note 3). In recent testimony, the Commissioner of Social Security blamed the high reversal rate by administrative law judges on the poor development of records before the hearing. *Disability Insurance Legislation: Hearings on Proposals to Improve the Disability Insurance Program before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 250-51 (1979) [hereinafter cited as 1979 House Hearings]. See also *Garrett v. Richardson*, 471 F.2d 598, 604 (8th Cir. 1972) (large number of remands are the result of courts' proper oversight coupled with "placid procrastination—'passing the buck,' if you will—on the part of hearing examiners"); STAFF OF HOUSE COMM. ON WAYS AND MEANS, 94TH CONG., 2D SESS., COMMITTEE STAFF REPORT ON THE DISABILITY INSURANCE PROGRAM 272-78 (1974) [hereinafter cited as STAFF REPORT] (most remands by district courts, whether requested by the Social Security Administration or by claimant, were ordered because of deficiencies in the factual record).

10. The disability determination process is described at text accompanying notes 42-69 *infra*. Records can be incomplete because evidence, even of a preexisting disability, was not available. Under these circumstances, a reversal by an administrative law judge can "represent a perfection of the administrative process rather than adjudication." Dixon, *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 DUKE L.J. 681, 695 n.71.

11. See generally Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833, 845-47 (1976). See also Dixon, *supra* note 10, at 732-33 n.258; note 111 *infra*.

rent non-adversary structure something like advocacy is needed at disability hearings, but the responsibility for advocating both the claimant's and the Social Security Administration's position is left to the administrative law judge.¹² Recent studies indicating that claimants fare better at hearings with representation,¹³ the fact that the Administration is concerned about the need for government representation, and the apparent reality that many administrative law judges are not fulfilling their advocacy role adequately, suggest that a new model for meeting the representation and advocacy needs of non-adversary disability hearings would be useful.

One alternative, of course, would be adversary hearings. Although the possible value of a shift to something like adversary hearings has been recognized recently by the Social Security Administration,¹⁴ most commentators have concluded that the non-adversary system, with perhaps some modification, should remain.¹⁵ Rejection of an adversary

12. The notion that Social Security administrative law judges must wear "three hats" has been recognized widely. *See, e.g.*, B. SCHWARTZ, ADMINISTRATIVE LAW 253 (1976). *See generally* text accompanying notes 73-82 *infra*. *Cf.* Richardson v. Perales, 402 U.S. 389, 410 (1971) (Court rejected arguments based on an "advocate-judge-multiple-hat suggestion," finding that "[t]he social security hearing examiner . . . does not act as counsel. He acts as an examiner charged with developing the facts.").

13. The most comprehensive study is by Popkin, *supra* note 1. *See also* Boyd & Johnson, *Report of the Disability Claims Process Task Force*, reprinted in RECENT STUDIES, *supra* note 2, 1 at 101-02; Dixon, *supra* note 10, at 720-22. An absence of clear data on the effect of representation was noted in an article published three years before the Popkin study, in which the author also expressed his doubts as to whether one could show a cause-and-effect relationship between representation and favorable decisions, given such additional factors as the relative quality of cases lawyers choose to take, and of cases claimants choose to bring to lawyers. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 790, 790 n.52 (1974). The findings of the Popkin study and other related material on the effect of representation are discussed at text accompanying notes 86-89, 95-98 *infra*.

14. The proposed experiment with government representatives would have added an adversary dimension to the process, although the degree of adversariness of the hearing was not clear. *See* text accompanying notes 199-204 *infra*.

15. *See, e.g.*, J. MASHAW, *et al.*, *supra* note 3, at 32-33; B. SCHWARTZ, *supra* note 12, at 252-54; Mashaw, *supra* note 13, at 776-804. At the time that legal services programs were first being funded by the federal government a number of commentators called for strong advocacy by lawyers and full adjudicatory procedures regarding welfare benefits particularly. *See, e.g.*, Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1253 (1965); Sparer, *The Role of the Welfare Client's Lawyer*, 12 U.C.L.A. L. REV. 361, 366-74 (1965). *Cf.* Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479, 492-500 (1966) (limited use of any type of adjudicatory procedures in dealing with problems of general welfare administration). It has been suggested that a distinction can be drawn between the administration of state-run welfare programs, which is often hostile to claimants, and that of the Social

system for disability hearings, however, should not preclude a rejection of the artificial and unworkable advocacy roles assigned to administrative law judges. The question of whether to provide a representative or advocate for claimants, the Social Security Administration, or both, should not be approached from the perspective of the parties' separate interests, as an issue of a right to or need for counsel.¹⁶ The question should be framed from an institutional and structural perspective: Assuming a shared interest on the part of claimants and the government in a fairly and properly administered Social Security program, which forms the underlying premise for the use of a non-adversary process in the first place, how can these shared goals be achieved more equitably and efficaciously? The following analysis of the present disability determination process, including the roles assigned to administrative law judges and representatives at hearings, the courts' concern for the rights of claimants who were unrepresented in the process, and recent suggestions for change in the process including the proposed government representative experiment, demonstrates that there is a need for independent advocacy and representation at non-adversary disability hearings.

The use of independent non-adversary representatives responsible for development and presentation of all relevant evidence and issues would resolve most of the deficiencies in the hearing stage of the present process, including those resulting from deficiencies in the prehearing stages. Administrative law judges would be relieved of unmanageable responsibilities and the hearing would be conducted fairly and on a complete record without undermining the advantages of a non-adversary system or incurring the cost of instituting truly adversary proceedings.

Although it is beyond the scope of this Article to project costs to the

Security Administration, which is seen as more helpful to claimants. See Popkin, *supra* note 1, at 992 n.4, and authorities cited therein. But see Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1289 (1975), in which Judge Friendly suggested that the adversary system also may be unsuitable in welfare cases.

16. See generally Mashaw, *supra* note 13, at 775. There is no suggestion here that claimants have a legal or constitutional right to be provided counsel. Although claimants can, of course, bring lawyers or other representatives to disability hearings, 42 U.S.C. § 406(a), Mathews v. El-drige, 424 U.S. 319, 339 (1976), the argument that a lack of representation violates due process was dismissed recently as "frivolous." Figueroa v. Secretary of HEW, 585 F.2d 551, 554 (1st Cir. 1978). The federal government planned to provide lawyers for welfare claimants in 1969, 34 Fed. Reg. 1356 (1969), but the proposal was withdrawn following a change in administrations. 35 Fed. Reg. 10591 (1970).

system of introducing some type of representation into the process, it can be assumed that the lack of representation or proper development and presentation by the administrative law judges results in many costly remands that would be unnecessary if more cases were developed and presented properly before or at the original hearing. Moreover, it would be inappropriate to suggest that increased cost resulting from additional correct determinations of disability would be a loss to the system, and an improved process would probably produce significant cost savings because there would be fewer incorrectly determined awards of benefits.¹⁷ A single non-adversary representative with only those resources currently available to administrative law judges would provide the basic, routine evidence often absent from records under the existing system. In addition, the representative would be trained and available to explore evidence and issues suggested by the record that might otherwise be ignored. As a result, a non-adversary structure clearly appropriate for disability adjudications, and one that probably should be considered for many other types of adjudications,¹⁸ would achieve the advantages of a more traditional judicial role for the decisionmaker without adding unnecessary formalities and opposition to the proceedings or altering their fundamental non-adversary character.

I. THE NEED FOR REPRESENTATION AT NON-ADVERSARY HEARINGS

Despite its non-adversary character, the disability determination process is designed to test whether a claimant, who may or may not be eligible, should receive monthly disability benefits. By the time claimants file for a hearing, the government has already disagreed with the claimants' evaluation of their disability and ruled against them. The participants view the hearing as anything but a neutral process.¹⁹ In this section, the entire disability determination process is reviewed;

17. See STAFF OF SUBCOMM. ON SOCIAL SECURITY, HOUSE COMM. ON WAYS AND MEANS, 96TH CONG., 1ST SESS., ACTUARIAL CONDITION OF DISABILITY INSURANCE 13 (Comm. Print 1979) ("The important point is that better documentation has led to more 'right' decisions."). See also note 173 *infra*.

18. See generally Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083 (1975); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). See also Friendly, *supra* note 15, at 1289.

19. See Yourman, *Report on a Study of Social Security Beneficiary Hearings, Appeals, and Judicial Review*, reprinted in RECENT STUDIES, *supra* note 2, 125 at 139. See also B. SCHWARTZ, *supra* note 12, at 253.

then, the hearing procedures are analyzed in some detail to determine whether there is a need for representation at non-adversary hearings.

A. *The Social Security Disability Determination Process*

The procedural rules and substantive law governing the Social Security disability programs are extremely complex.²⁰ A brief survey of the scope and purposes of the programs, substantive disability law, and the disability determination process follows in order to frame the issues concerning the hearing properly.

1. *The Social Security Disability Programs*

Congress added disability benefits for insured wage earners to the Social Security program in 1956, which was twenty-one years after the Social Security Act first established a retirement insurance program.²¹ To establish disability, one must be unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."²² Furthermore, the impairment must be "demonstrable by medically acceptable clinical and laboratory diagnostic techniques," although disability has been established by subjective evidence of pain reasonably related to a determinable medical condition.²³ The requirement of a medical impairment which is severe enough to preclude substantial gainful activity, shows that disability benefits are designed to alleviate only total disruptions of earnings caused by a physical or mental inability to moderate the loss by any type of activity.²⁴ Moreover, the disruption must be based on a disability that began within a period of time related to the claimant's receipt of earned

20. See generally H. McCORMICK, *SOCIAL SECURITY CLAIMS AND PROCEDURES* (1978 & Supp. 1980). There are separate federal regulations for OASDI and SSI. See 20 C.F.R. §§ 404.1-1930 (OASDI) (1980); *id.* §§ 416.101-2119 (SSI). See also 45 Fed. Reg. 52078, 55566 (1980) (reorganization and revision of portions of these regulations). Unless there is a significant difference, only the OASDI regulations are cited.

21. Act of Aug. 14, 1935, ch. 531, 49 Stat. 620. Disability benefits were first limited to persons fifty years of age and over. Social Security Amendments of 1956, ch. 836, 70 Stat. 807. The minimum age requirement was dropped in 1960. Social Security Amendments of 1960, Pub. L. No. 86-778, § 401, 74 Stat. 967.

22. 42 U.S.C. § 423(d)(1)(A) (1976).

23. *Id.* § 423(d)(3); 45 Fed. Reg. 55589 (1980) (to be codified in 20 C.F.R. § 404.1529). See generally H. McCORMICK, *supra* note 20, § 412.

24. See generally Liebman, *supra* note 11, at 842-50. The loss here is limited to earned in-

income because a special insured status required for the disability program remains in effect only for a limited time following a claimant's last covered employment.²⁵

The Second Circuit Court of Appeals in *Kerner v. Fleming*²⁶ in effect modified this concept of total disability from both a medical and a vocational point of view by holding that the medical impairment need preclude only employment reasonably available in the area where the claimant lived.²⁷ Thus, although a claimant's impairment would be measured relative to any substantial gainful employment reasonably available in the area, benefits could not be denied because of the claimant's medical capacity to perform a job available only in a distant part of the country. Congress reacted in 1967 by amending the Act to state explicitly that insured wage earners are disabled only if their impairments are so severe that they cannot do their previous work or, "considering [their] age, education, and work experience, [cannot] engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which [the claimant] lives, or whether a specific job vacancy exists . . . , or whether [the claimant] would be hired," and that it is sufficient if suitable work exists "in several regions of the country."²⁸

Despite the limited scope of coverage resulting from the 1967 amendments, which were designed to limit rising costs of the program,²⁹ wage earner disability awards have increased steadily since 1968—an increase from approximately 325,000 in 1968 to over 450,000 in 1978.³⁰ Moreover, disability benefits became available to uninsured disabled persons in 1974 through the Supplemental Security Income

come because there are no limits on unearned income or resources in the OASDI program. See note 1 *supra*.

25. Insured wage earners can retain insured status for up to five years following their last covered employment, depending on their work record before that time. See 42 U.S.C. § 423(c) (1976). To qualify for OASDI, the disability must have commenced before the expiration of the claimant's insured status, although the application can be filed at any time. Retroactive benefits are limited, however, to one year prior to the date of the application. *Id.* § 423(b).

26. 283 F.2d 916 (2d Cir. 1960).

27. See generally Liebman, *supra* note 11, at 850-53.

28. 42 U.S.C. § 423(d)(2)(A) (1976). See Social Security Amendments of 1967, Pub. L. No. 90-248, § 158(d)(2)(A), 81 Stat. 868. Persons seeking disability benefits as dependents, so-called "secondary benefits," must show that they are precluded from "engaging in any gainful activity," regardless of their age, education, and work experience. 42 U.S.C. § 423(d)(2)(B) (1976).

29. See H.R. REP. NO. 544, 90th Cong., 1st Sess. 28 (1967).

30. STAFF OF SUBCOMM. ON SOCIAL SECURITY, HOUSE COMM. ON WAYS AND MEANS, 96TH CONG., 1ST SESS., ACTUARIAL CONDITION OF DISABILITY INSURANCE 5 (Comm. Print 1979).

program, which has essentially the same disability standard, without limitations imposed by special insured status, but with an added requirement that financial need be shown.³¹ Almost seven million Social Security and Supplemental Security Income disability beneficiaries received approximately sixteen billion dollars in 1979.³²

2. *Proving Disability*

Disability can be established either with or without relation to "vocational factors" of age, education, and work experience.³³ Medical evidence alone can be sufficient to prove disability if the impairment is severe enough to meet the standards set forth in the Administration's "Listing of Impairments," a grouping of impairments and the symptoms necessary to show the requisite severity.³⁴ If a particular impairment does not meet the listing standards, then the claimant must show a combination of impairments that is severe enough to prevent the continuation of past relevant work.³⁵ After the claimant shows an inability to perform past relevant work, a shifting of burdens occurs and the government must show the existence of other work that the claimant is physically and vocationally capable of performing.³⁶ The courts have been reluctant, however, to apply any burdens strictly in light of the non-adversary nature of the proceedings.³⁷ Courts generally require four elements of proof relevant to a finding of disability outside of the

31. Social Security Amendments of 1972, Pub. L. No. 92-603, §§ 1601-1602, 86 Stat. 1465. See note 1 *supra*.

32. [1979] SOCIAL SECURITY ADM. ANN. REP. 2, 5. In 1979 more than 30 million people received almost \$90 billion through the retirement and survivors insurance program, and approximately 27 million people received almost \$20 billion in basic Medicare benefits. *Id.* at 1, 6.

33. See 45 Fed. Reg. 55588 (1980) (to be codified in 20 C.F.R. § 404.1520).

34. *Id.* at 55598 (to be codified in 20 C.F.R. subpart P, appendix 1). Thus, the listing for asthma requires a certain level of air obstruction, depending on height, or episodes of attacks lasting at least several hours and requiring intensive treatment which occur at least once every two months or six times a year, despite treatment, together with "prolonged expiration with wheezing or rhonchi between attacks." *Id.* at 55602 (to be codified in 20 C.F.R. § 3.03, subpart P, appendix 1).

35. *Id.* at 55588 (to be codified in 20 C.F.R. § 404.1520(e)). Past relevant work is ordinarily limited to work performed within the past fifteen years. *Id.* at 55591 (to be codified in 20 C.F.R. § 404.1565(a)).

36. See, e.g., *Hall v. Secretary of HEW*, 602 F.2d 1372, 1375 (9th Cir. 1979); *Stark v. Weinberger*, 497 F.2d 1092, 1098 (7th Cir. 1974); *Meneses v. Secretary of HEW*, 442 F.2d 803, 806 (D.C. Cir. 1971).

37. See *Hess v. Secretary of HEW*, 497 F.2d 837, 840 (3d Cir. 1974) (recognizing that although claimant has the burden of proving disability, "due regard for the beneficent purposes of the legislation requires that a more tolerant standard be used . . . than . . . where the adversary

Listing of Impairments: first, objective medical facts; second, diagnoses or opinions based on such facts; third, subjective evidence of symptoms of disability, such as pain, from the claimant and other witnesses; and fourth, the claimant's age, education, and work experience.³⁸

Often, the Secretary will have to use a vocational expert to present sufficient evidence concerning the effect of the vocational factors on the claimant's ability to work.³⁹ Since 1978, the Administration has used a set of "Medical-Vocational Guidelines" in an attempt to simplify determinations when vocational factors may show an inability to perform substantial gainful activity.⁴⁰ The guidelines consider the claimant's residual physical capacity to perform, for example, sedentary or light work, and incorporate certain key vocational information. Thus, expert evidence must be introduced in many cases as to the nature of the claimant's previous employment and the transferability of any skills that the claimant may have developed.⁴¹

3. *The Disability Determination Process*

Applicants file for disability benefits at local offices of the Social Security Administration.⁴² A state agency under contract with the Administration⁴³ makes the initial determination of eligibility. A team including at least one medical doctor issues a decision based on a writ-

system prevails"). See also *Dobrowsky v. Califano*, 606 F.2d 403, 406 (3d Cir. 1979); *Miranda v. Secretary of HEW*, 514 F.2d 996, 998 (1st Cir. 1975).

38. See *DePaepe v. Richardson*, 464 F.2d 92, 94 (5th Cir. 1972); *Gold v. Secretary of HEW*, 463 F.2d 38, 41 n.2 (2d Cir. 1972). The Supreme Court held that a written report by a licensed physician who examined the claimant can constitute substantial evidence for a finding against the claimant given the claimant's ability to subpoena witnesses. *Richardson v. Perales*, 402 U.S. 389, 402 (1971). Cf. *Johnson v. Harris*, 612 F.2d 993, 998 (5th Cir. 1980) (denial based only on reports by non-examining doctors held not supported by substantial evidence).

39. See, e.g., *O'Banner v. Secretary of HEW*, 587 F.2d 321 (6th Cir. 1978); *Watson v. Secretary of HEW*, 478 F. Supp. 394 (N.D. Tex. 1979). See also text accompanying notes 151-52 *infra*.

40. 45 Fed. Reg. 55617 (1980) (to be codified in 20 C.F.R. subpart P, appendix 2). The guidelines recently withstood a broad constitutional and statutory attack. See *Stallings v. Harris*, 493 F. Supp. 956, 957-61 (W.D. Tenn. 1980).

41. 45 Fed. Reg. at 55617 (to be codified in 20 C.F.R. subpart P, appendix 2). See also *Gilliam v. Califano*, 620 F.2d 691, 694 (8th Cir. 1980); *Hicks v. Califano*, 600 F.2d 1048, 1051 (4th Cir. 1979).

42. 20 C.F.R. § 404.614 (1980). Applications also can be filed elsewhere under certain circumstances. *Id.* See also SOCIAL SECURITY ADMINISTRATION, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, SSA CLAIMS MANUAL § 2035 [hereinafter cited as CLAIMS MANUAL].

43. 42 U.S.C. § 421(a) (1976). State agency participation is at the option of the states. Recent amendments add authority for the Secretary to hold states to a performance standard. See 1980 Amendments, *supra* note 2, § 304(b) at 454.

ten record that should contain, in addition to the initial application, reports by the claimant's physicians and copies of other relevant medical records.⁴⁴ Claimants are expected and obliged to participate with Administration personnel in the gathering of relevant information.⁴⁵ Claimants found ineligible can request a reconsideration, which is an internal review of the record, and submit additional evidence into the record.⁴⁶

After denial of reconsideration, the claimant can request a hearing before an administrative law judge in which the claimant can be represented by an attorney or other authorized representative.⁴⁷ A prehearing case review can be held, at which time the determination can be reversed or revised,⁴⁸ or the case can be remanded for further consideration by the state agency if the judge feels a favorable decision could be rendered on the record, including any additional evidence submitted in preparation for the hearing.⁴⁹ After deciding that a hearing will be conducted, the administrative law judge is expected to note inadequacies or conflicts in the evidence, decide whether further evidence should be developed by the claimant or from some other source, decide whether to call a vocational or medical expert at the hearing, and note any questions of law or policy that need to be researched.⁵⁰ The judge must also select proposed exhibits from the record⁵¹ and identify the issues to be resolved at the hearing.⁵² If the medical evidence is deficient or in conflict, the judge is to secure additional information from

44. See H. McCORMICK, *supra* note 19, § 525. See generally *Mathews v. Eldridge*, 424 U.S. 319, 336-39 (1976). Recent amendments require that decisions unfavorable to the claimant be communicated in "understandable language," setting forth the evidence considered and the reasons for the decision. 1980 Amendments, *supra* note 2, § 305 at 457.

45. See generally 45 Fed. Reg. 55586-88 (1980) (to be codified in 20 C.F.R. §§ 404.1512-.1518).

46. *Id.* at 52082 (to be codified in 20 C.F.R. § 404.907); CLAIMS MANUAL, *supra* note 42, § 7120. Reconsideration is the first appeal stage for all OASDI claims; in circumstances not relevant here, SSI decisions may be subject first to an informal conference with a decisionmaker where witnesses can be presented. *Id.* at 52098-99 (to be codified in 20 C.F.R. §§ 416.1414-.1416).

47. 42 U.S.C. § 405(b) (1976); 45 Fed. Reg. at 52084, 52086 (to be codified in 20 C.F.R. §§ 404.929, .950(a)).

48. *Id.* at 52085 (to be codified in 20 C.F.R. § 404.941).

49. OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, OHA HANDBOOK §§ 1-300,-340 [hereinafter cited as OHA HANDBOOK].

50. *Id.*

51. *Id.* § 1-344.

52. *Id.* § 1-341.

the treating source or order a consultative examination by an independent physician.⁵³ Additionally, the judge should determine whether additional non-medical evidence is needed,⁵⁴ and if necessary, secure a vocational expert and subpoena other relevant witnesses.⁵⁵ Finally, a prehearing conference can be held to narrow the matters in dispute.⁵⁶ Administrative law judges are assigned staff to assist in obtaining additional evidence and preparing the case for hearing.⁵⁷ Claimants can examine the record compiled by the judge at any time prior to the hearing.⁵⁸

At the hearing, the administrative law judge is expected to look "fully into the issues" and receive all relevant testimony and evidence offered.⁵⁹ The judges question witnesses and allow claimants or their representatives to do the same.⁶⁰ Claimants are able to present an oral or written closing argument.⁶¹ Before terminating the hearing, the administrative law judge should ask if the claimant wishes to present any additional evidence and, if so, leave the record open for the submission of such evidence.⁶² The judge issues a written decision based on the

53. *Id.* § 1-510. The judge can request examination by specific institutions or physicians, *id.* § 1-513, as well as specific diagnostic procedures, *id.* § 1-514. The claimant's physicians can be served with a subpoena, if necessary. *Id.* § 1-524. A refusal by the claimant to cooperate can be a basis for denial. *See* 45 Fed. Reg. 55587 (1980) (to be codified in 20 C.F.R. § 404.1518); Kaminski v. Califano, 465 F. Supp. 367, 371 n.17 (S.D.N.Y.), *aff'd mem.* 614 F.2d 1288 (2d Cir. 1979).

54. OHA HANDBOOK, *supra* note 49, at § 1-530.

55. Expert vocational testimony can be obtained at the hearing, or in the form of written interrogatories. *Id.* §§ 1-531, -531-20. Administrative law judges can subpoena relevant witnesses on their own initiative or on request of a claimant. 42 U.S.C. § 405(d) (1976); 45 Fed. Reg. 52086 (1980) (to be codified in 20 C.F.R. § 404.950(d)). The local Social Security office should assist judges in locating witnesses. OHA HANDBOOK, *supra* note 49, at § 1-571.

56. 45 Fed. Reg. 52087 (to be codified in 20 C.F.R. § 404.961). OHA HANDBOOK, *supra* note 49, at § 1-349.

57. Staff can prepare abstracts of the evidence and assist the judge in obtaining missing evidence, OHA HANDBOOK, *supra* note 49, at §§ 1-345, -346, and can hold prehearing conferences, *id.* § 1-349.

58. *Id.* § 1-348.

59. 45 Fed. Reg. 52085 (1980) (to be codified in 20 C.F.R. § 404.944). The judge also can adjourn the hearing to receive additional evidence not available at the hearing. *Id.* The hearing itself can be waived, and the decision made on the basis of the written record. *Id.* at 52085-86 (to be codified in 20 C.F.R. § 404.948).

60. *Id.* at 52086 (to be codified in 20 C.F.R. § 404.950(e)). Judges are instructed to do the initial questioning themselves. OHA HANDBOOK, *supra* note 49, at § 1-656-20.

61. OHA HANDBOOK, *supra* note 49, at § 1-657; 45 Fed. Reg. 52086 (to be codified in 20 C.F.R. § 404.949).

62. OHA HANDBOOK, *supra* note 49, at §§ 1-658, -660.

record developed before and at the hearing.⁶³

The next stage in the process is review by the Appeals Council, which is a centralized review board located in Washington, D.C.⁶⁴ A request for review by the Appeals Council can be made by the claimant, the Administration, or on the Appeals Council's own motion.⁶⁵ Although review is limited essentially to cases containing an error of law or lack of substantial evidence to support the decision, "new and material evidence" can be submitted and will be evaluated if there was no hearing, or, if there was a hearing, may lead to a remand for further consideration by the Administration.⁶⁶ Appeals Council determinations become "final decisions" of the Secretary that can be appealed in the federal district courts.⁶⁷ The district courts determine whether the Secretary's decision, usually the written decision of the administrative law judge, is supported by "substantial evidence."⁶⁸ The court affirms, reverses, or remands the case, and bases its decision on the record compiled by the administrative law judge, or, in those cases reviewed by the Appeals Council, on the record compiled by the Appeals Council.⁶⁹

B. *The Minimum Requirements of the Disability Determination Process: A Complete Record and a Full and Fair Hearing*

The prehearing disability process described in the preceding section should produce a complete record of a claimant's physical and mental condition. Even if some records are not properly developed by the time

63. 45 Fed. Reg. 52086 (to be codified in 20 C.F.R. § 404.953(a)). A short form decision can be filed in cases decided completely in the claimant's favor. OHA HANDBOOK, *supra* note 49, at § 1-824.

64. See generally H. McCORMICK, *supra* note 19, at §§ 599-604.

65. 45 Fed. Reg. 52087-88 (to be codified in 20 C.F.R. §§ 404.967-.969).

66. *Id.* at 52088 (to be codified in 20 C.F.R. § 404.970). See also 1980 Amendments, *supra* note 2, § 306 at 457. Appeals Council review is actually in two stages. The request for review is filed and if that request is granted, then the decision is either affirmed, modified, reversed, or remanded. *Id.* (to be codified in 20 C.F.R. §§ 404.971, .979). Although parties can appear before the Appeals Council following its decision to grant review, courts have been concerned about Appeals Council decisions based on new evidence when claimants do not appear. See, e.g., Lonzollo v. Weinberger, 534 F.2d 712, 714 (7th Cir. 1976); Smith v. Weinberger, 356 F. Supp. 954, 955, 957-58 (C.D. Cal. 1973).

67. 42 U.S.C. § 405(g) (1976).

68. Richardson v. Perales, 402 U.S. 389, 401 (1971). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*, quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

69. See text accompanying notes 104-11 *infra* for further discussion of courts' authority to remand.

a hearing is held, a complete record should result from the hearing given the available procedures and the administrative law judges' responsibilities under applicable regulations. Records are often incomplete, however, both before and after an administrative hearing has occurred.⁷⁰ Although this result is troubling relative to the poor quality of prehearing development, the incompleteness of posthearing records is truly startling considering the role administrative law judges are expected to perform. The result is understandable, however, when one considers the role advocacy can play in this process and the fact that in most cases the claimant, and in all cases the government, is unrepresented.⁷¹ Professor Davis states that the "two main facts" about Social Security hearings are the administrative law judges' responsibility to develop both sides of the record and the nonrepresentation of claimants in most cases.⁷² The manner in which these facts affect the hearing process is the subject of this section.

1. *The Role of the Administrative Law Judge*

The Social Security administrative law judge "does not act as counsel. He acts as an examiner charged with developing the facts."⁷³ Al-

70. Through the administrative hearing level "there is probably more inconsistency in development effort than in decisional outcome." SOCIAL SECURITY HEARING SYSTEM, *supra* note 9, at 48-49. See also ISSUES RELATED TO DISABILITY PROGRAMS, *supra* note 2, at 47. Popkin found that the presentation of new evidence is a significant factor in successful disability appeals. Popkin, *supra* note 1, at 1032-34. See also 1979 House Hearings, *supra* note 9, at 246-47 (Commissioner of Social Security Administration agreeing that poorly developed cases are a problem suggesting a need for earlier and "more careful development of the claimant's case"); *id.* at 250-51 (Commissioner noting that administrative law judges often are presented with an entirely new case to review because the records are poorly developed at the initial levels).

The distinction drawn between before and after the administrative hearing separates the initial determination and reconsideration levels of the process, which are handled exclusively by the Social Security Administration and the state agency, from the administrative hearing level in which independent administrative law judges become involved. See text accompanying notes 42-63 *supra*. Accordingly, the relevant beginning of the hearing process is when the appeal is requested and the file transferred to the Office of Hearings and Appeals.

71. In the 1977 fiscal year, 31% of all SSI claimants and 42% of all OASDI claimants were represented at hearings. Kochhar, *Appeals Under the SSI Program: January 1974-August 1976*, SOC. SEC. BULL., April 1979, at 24, 28. The breakdown by type of representative is: 16% attorney and 15% non-attorney for SSI claimants; 34% attorney and 8% non-attorney for OASDI claimants. *Id.*

72. K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES 109 (Supp. 1978).

73. *Richardson v. Perales*, 402 U.S. 389, 410 (1971). The responsibility to develop a complete and useful record is also accepted by non-Social Security administrative law judges. See, e.g., *Estate of Lucille Mathilda Callous Leg Ireland*, 78 I.D. 66, 69-70 (1971) (Department of Interior administrative proceeding probating Indian estate); Zwerdling, *Reflections on the Role of an Ad-*

though views vary as to how this charge is to be carried out,⁷⁴ administrative law judges are expected to decide disability claims on the basis of a complete record and following a full and fair hearing. Moreover, their decisions must be based on the record, and not on facts or inferences developed or assumed on their own.⁷⁵

The minimum requirements of a complete record and full and fair hearing apply whether claimants are represented or not.⁷⁶ The nature of the administrative law judge's role in meeting these minimum requirements changes, however, when claimants are not represented. "[I]n administrative proceedings in which rights and privileges are in issue and the guiding hand of counsel is not present to advocate their existence, a duty devolves on the hearing examiner to scrupulously and conscientiously probe into, inquire of, and explore for all of the relevant facts."⁷⁷ Moreover, judges are expected to have sufficient exper-

ministrative Law Judge, 25 AD. L. REV. 9, 14 (1973) (author Chief Administrative Law Judge for the Federal Power Commission). Some notable trial judges have expressed concern about their traditionally inactive fact development role. See Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1052-59 (1975); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1283-93 (1952). Cf. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1, 52-80 (1978) (argues against trial judges becoming more active in questioning witnesses and controlling trial).

74. Most commentators argue for a more active role in developing the record. See, e.g., B. SCHWARTZ, *supra* note 12, at 253-54; J. MASHAW, *et al.*, *supra* note 3, at 69-73; Zwerdling, *supra* note 73, at 27. Professor Schwartz argues that Social Security administrative law judges cannot be as neutral as the language from *Richardson v. Perales*, quoted in text accompanying note 73 *supra*, suggests because a claim must have been denied twice (initial determination and reconsideration) before it gets to a hearing, thus indicating a "plausible case against the claimant." B. SCHWARTZ, *supra* note 12, at 254.

75. Thus, cases were remanded when the administrative law judge relied on administrative notice, *Kenny v. Weinberger*, 417 F. Supp. 393, 399 (E.D.N.Y. 1976), unsubstantiated adverse inferences, *Flores v. Department of HEW*, 465 F. Supp. 317, 326 (S.D.N.Y. 1978), and his own observations of a claimant's capacity to work, *Wiginton v. Secretary of HEW*, 470 F. Supp. 235, 237 (E.D. Wis. 1979).

76. See, e.g., *Gilliam v. Califano*, 620 F.2d 691, 693-94 (8th Cir. 1980); *Thorne v. Califano*, 607 F.2d 218, 219 (8th Cir. 1979); *Kelley v. Weinberger*, 391 F. Supp. 1337, 1342 (N.D. Ind. 1974); *Garrett v. Richardson*, 363 F. Supp. 83, 90 (D.S.C. 1973). When a claimant is represented, the administrative law judge should give the representative "wide latitude" in cross-examining witnesses. See *Trice v. Weinberger*, 392 F. Supp. 1193, 1197 (N.D. Ga. 1975).

77. *Hennig v. Gardner*, 276 F. Supp. 622, 624 (N.D. Tex. 1967). This language is often quoted by other courts. See, e.g., *Cox v. Califano*, 587 F.2d 988, 991 (9th Cir. 1978); *Smith v. Secretary of HEW*, 587 F.2d 857, 860 (7th Cir. 1978); *Gold v. Secretary of HEW*, 463 F.2d 38, 43 (2d Cir. 1972). See also *Dobrowolsky v. Califano*, 606 F.2d 403, 407 (3d Cir. 1979) ("heightened duty of care" and "responsibility to assume a more active role" when claimants are unrepresented). A similar responsibility exists when claimants are unrepresented at hearings involving nondisability issues. See, e.g., *Farmer v. Mathews*, 584 F.2d 796, 800-01 (6th Cir. 1978) (cause of

tise and experience to fulfill the role properly.⁷⁸

There are two different aspects to the administrative law judge's responsibility to reach a decision based on a complete record and following a full and fair hearing. First, a complete written record must be developed; and second, all relevant facts and issues must be presented by proper questioning and cross-examination of appropriate witnesses, including the claimant, and by competent legal argument. Many courts have recognized the development aspect of the administrative law judge's responsibility;⁷⁹ the duty to compile and develop a complete record is one that is shared with others during the disability determination process. The presentation aspect, however, is unique to the administrative law judge because the hearing is the only opportunity for the claimant and other witnesses to meet face-to-face with a decision maker.⁸⁰ Administrative law judges are put in a difficult position relative to the presentation aspect of their responsibility. On the one hand, they are expected to fill any gaps in the record favorable to claimants yet overlooked by claimants or their representatives by calling, questioning, and cross-examining all relevant witnesses and covering all po-

death for black lung benefits); *Barnes v. Richardson*, 342 F. Supp. 435, 438 (S.D.N.Y. 1972) (father-child relationship for survivors benefits). Some courts express the responsibility in less active terms. *See, e.g., Warmijak v. Califano*, 465 F. Supp. 441, 443 (E.D. Pa. 1979) ("[N]ot without responsibility for developing a complete and accurate factual record"); *Stewart v. Cohen*, 309 F. Supp. 949, 956 (E.D.N.Y. 1970) ("a duty not to be a mere umpire, but to see that all relevant facts are developed"). *Cf. Saldana v. Weinberger*, 421 F. Supp. 1127, 1131 (E.D. Pa. 1976) (court disapproves of "the ALJ's narrow view of his role").

78. *See Parker v. Califano*, 441 F. Supp. 1174, 1179 (N.D. Cal. 1977) (claimant represented). Although Social Security judges must have seven years of "qualifying experience" and must participate in an extensive preappointment review, ISSUES RELATED TO DISABILITY PROGRAMS, *supra* note 2, at 45, the quality of federal administrative law judges is the subject of controversy. *See generally* Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57 (1979). Attempts to monitor the performance of Social Security administrative law judges have been resisted. *See Nash v. Califano*, 613 F.2d 10 (2d Cir. 1980); ISSUES RELATED TO DISABILITY PROGRAMS, *supra* note 2, at 40-41. *Cf. Chassman & Rolston*, *supra* note 6, at 808-09, 817-21 (authors note administrative law judges' concern about monitoring of their decisions but report that recent implementation of a quality assurance system shows that the review of certain error-prone categories of disability determinations to assure that records do not indicate a serious error may be valuable). New authority to monitor the entire disability determination process was enacted recently. *See* 1980 Amendments, *supra* note 2, § 304 at 453-57.

79. *See* text accompanying notes 130-52 *infra*.

80. One of the clearest findings of a recent survey of administrative law judges is their almost unanimous opinion (92%) that their ability to judge pain and general credibility through face-to-face evaluations is a very important element of the hearing process. Only 2% responded that the confrontations are not important. SURVEY AND ISSUE PAPER, *supra* note 3, at 46.

tential legal theories of disability.⁸¹ On the other hand, although they can call certain witnesses in support of the government's case, such as vocational experts, and question claimants and other witnesses on facts unfavorable to claimants, they must advocate on behalf of the government in an essentially neutral manner.⁸²

The dual realities that administrative law judges often do not advocate effectively for claimants and cannot advocate fully on behalf of the Social Security Administration can lead to the simple recommendation that representatives should be provided for both sides.⁸³ Indeed, a move to an adversary system has been suggested as a means of resolving some of the difficulties faced by administrative law judges in developing and presenting disability claims.⁸⁴ To make a meaningful recommendation, however, one must know what the representatives' role would be.

81. See text accompanying notes 153-70 *infra*. As the number of district court remands suggests, see note 7 *supra*, administrative law judges do not always fulfill this responsibility. See *J. MASHAW, et al., supra* note 3, at 82-87. Some courts require only that claimants be advised as to how they should present their own case. See, e.g., *Figueroa v. Secretary of HEW*, 585 F.2d 551, 554 (1st Cir. 1978) (offer claimant opportunity to ask questions of witness); *Hess v. Secretary of HEW*, 497 F.2d 837, 841 (3d Cir. 1974) (advise claimant of importance of full and accurate medical evidence and allow claimant to submit such evidence after hearing); *Warmijak v. Califano*, 465 F. Supp. 441, 443 (E.D. Pa. 1979) (advise claimant of importance of full and accurate medical evidence and allow claimant to submit such evidence after hearing).

82. Thus, administrative law judges have been rebuffed for "badgering" a claimant and "urging and leading" him to admit he could perform a job he knew nothing about, *Floyd v. Finch*, 441 F.2d 73, 95 (6th Cir. 1971) (*McAllister, J., dissenting*), for "overzealous" adverse questioning of a claimant, *Concepcion v. Secretary of HEW*, 337 F. Supp. 899, 902 (D.P.R. 1971), and for "employ[ing] expert questioning to write a record exclusively favorable to the government's side of the case," *Copley v. Richardson*, 475 F.2d 772, 774 (6th Cir. 1973). See also *Griffin v. Califano*, 478 F. Supp. 564, 565 (D.S.C. 1979) (disability benefits hearing "metamorphasized" into an employment interview because the administrative law judge "attempted to help [the claimant] out of his predicament by finding him a job"); *Puckett v. Mathews*, 420 F. Supp. 364, 366 (W.D. Va. 1976) (administrative law judge's request for additional x-ray reading in black lung benefits case criticized as "unwarranted and improper" because one government doctor had already confirmed necessary diagnosis).

83. See *Kaufman, District Court Review of Department of Health, Education and Welfare Decisions*, 26 AD. L. REV. 113, 116 (1974) (suggests that both claimants and the government should be represented by "para-counsel" so the administrative law judge "could devote himself solely to being a judge"). The author, a United States district judge, has indicated his belief that claimants should be represented by counsel. See *Hicks v. Mathews*, 424 F. Supp. 8, 10 (D. Md. 1976).

84. See *Yourman, supra* note 19, at 135 (adversary system can avoid problems of maintaining administrative law judge impartiality when cross-examination of claimants or their witnesses required). The proposed government representative experiment would have moved to a more adversarial system. See text accompanying notes 199-204 *infra*.

2. *The Role of the Representative*

One view is that no role exists for representatives in Social Security disability hearings,⁸⁵ today, most commentators disagree with this position.⁸⁶ Thus, Professor Popkin in his 1977 study on the effect of representation at non-adversary proceedings, including those for Social Security disability benefits, found that claimants were more successful when represented and concluded that although attorneys may tend to take the better cases, “a more plausible explanation is that counsel can skillfully organize evidence to prove a case.”⁸⁷ Moreover, the advantage of representation was found to be limited in Social Security cases to the hearing stage, which has become the most important stage of the process in an increasingly large number of cases because the prehearing stages are less effective and the claimant is more likely to be denied benefits on initial determination and following reconsideration.⁸⁸

85. See 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8.10 at 193 (Supp. 1965) (“The examiner is accustomed to developing the records without assistance of counsel on either side. When counsel does represent a claimant, usually he is useless to the examiner and a needless expense to the claimant”).

86. See authorities cited note 13 *supra*. The disability determination process that Professor Davis considered in 1965 is far different from the present process. In 1965, 23,323 hearing requests were received, 71.1% of those cases were favorable to the government, and 68.7% of the cases appealed to the district courts were either affirmed or dismissed. SOCIAL SECURITY ADMINISTRATION, U.S. DEP’T OF HEW, OPERATIONAL ANALYSIS FOR THE BUREAU OF HEARINGS AND APPEALS 17, 18, 29 (1973). In 1979, 226,240 hearing requests were received (including 49,531 SSI cases), 47% resulted in decisions favorable to the government, and approximately 50% of the cases appealed to the district courts were either affirmed or dismissed. 1979 FACT SHEET, *supra* note 6, at 2, 4.

87. Popkin, *supra* note 1, at 1032-33. Cf. Yourman, *supra* note 19, at 168-69 (attorneys can be helpful but rarely affect the outcome). Of course, some claimants with strong cases may proceed without representation because they feel they can and do win without counsel. See Mashaw, *supra* note 13, at 790 n.52.

88. Representation is not relevant at the initial determination stage, and therefore initial determinations were not included in the Popkin study. He did find, however, that “represented claimants did not have an advantage [at] the Social Security reconsideration stage.” Popkin, *supra* note 1, at 1026. Although the percentage of initial OASDI disability claims approved has dropped slightly during the past five years and the percentage of reconsideration decisions favorable to claimants has dropped by one-half, [1979] SOCIAL SECURITY ADMIN. ANN. REP. 2; [1975] SOCIAL SECURITY ADMIN. ANN. REP. 2, the percentage of hearing decisions favorable to claimants increased from 41.9% in 1975 to 53% in 1979. SOCIAL SECURITY ADMINISTRATION, U.S. DEP’T OF HEW, OPERATIONAL ANALYSIS OF THE BUREAU OF HEARINGS AND APPEALS 25 (1978); 1979 FACT SHEET, *supra* note 6, at 2. At a recent meeting the Social Security administrative law judges’ ALJ Policy Council requested that the Commissioner of Social Security be advised of their “concern that the pressure being applied to the State Agencies at the Reconsideration Level, to suppress the number of reversals, is increasing the workload of OHA and artificially and counterproductively inflating the number of OHA reversal decisions which should have been dis-

Although Popkin found that the addition of new evidence is the most important element of a successful disability appeal, he also found that represented claimants are more likely to present new evidence⁸⁹ and that represented claimants are advantaged even when no new evidence is presented at the hearing.⁹⁰ An earlier study also found a greater success rate for represented claimants, but declined to offer an explanation.⁹¹ A 1978 report by The National Center for Administrative Justice recognizes the value of representation in disability hearings, but suggests that the administrative law judge should retain control of the presentation of the case.⁹² Obviously, the actions of the administrative law judge in any particular case affect the role of the representative or the need for one at all,⁹³ and the presence of a representative is meaningless if the representation is ineffective.⁹⁴ Although these studies tend to look at the process from the claimants' point of view, the general conclusions are also relevant to the development and presentation of the government's case. Moreover, the premise of the proposed government representative experiment was that representation benefits the government in developing and presenting its case.⁹⁵

A general conclusion that representation is effective at disability

posed of favorably by reconsideration decision-makers." Memorandum from Chairman of the ALJ Policy Council to Administrative Law Judges 2 (August 4, 1980).

89. Popkin, *supra* note 1, at 1029-31. The study considers only new evidence presented at the hearing itself. *Id.* at 1021-22, chart 7, note k.

90. *Id.* at 1032.

91. Boyd & Johnson, *supra* note 13, at 103-04.

92. J. MASHAW, *et al.*, *supra* note 3, at 73. The need for administrative law judges to retain control is particularly true when the representative is not well prepared. *Id.* See also note 94 *infra*.

93. Compare *Clemmons v. Weinberger*, 416 F. Supp. 623, 625 (W.D. Mo. 1976) ("Many cases have recognized the handicap under which the unrepresented claimant labors and of which the administrative law judge must not take advantage") with *Toledo v. Secretary of HEW*, 435 F.2d 1297, 1297 (1st Cir. 1971) ("There is no suggestion that having counsel would have resulted in the presentation of any better case. It is quite apparent . . . that plaintiff was fairly treated; indeed the examiner was exceptionally solicitous and helpful").

94. Ineffective representation is a serious problem in disability hearings. See, e.g., *Arms v. Gardner*, 353 F.2d 197, 199 (6th Cir. 1965) (attorney did not examine witnesses or offer any testimony on claimant's behalf, and admitted to very little knowledge of Social Security law); *Lawrence v. Harris*, 2 Pov. L. REP. (CCH) ¶ 30694 (N.D. Ill. 1980) (nonattorney antagonized administrative law judge, obfuscated issues, and blocked full development of the record); *Tillman v. Weinberger*, 398 F. Supp. 1124, 1129-30 (N.D. Ind. 1975) (ineffective nonattorney substituting for attorney who did not appear). Cf. *Webb v. Finch*, 431 F.2d 1179, 1180 (6th Cir. 1970) (McCree, J., dissenting) (nonattorney was effective and experienced "unlike the attorney in *Arms v. Gardner*"). See generally J. MASHAW, *et al.*, *supra* note 3, at 92-93.

95. See text accompanying notes 205-07 *infra*.

hearings does not necessarily lead to the conclusion that a representative is always necessary or even useful. Popkin concludes that although representatives are effective in compiling new evidence, there is less need for representation when medical issues predominate because the agency can collect most medical records and reports, and less need exists for argument concerning those relatively technical facts.⁹⁶ On the other hand, he finds that "a representative's skills in producing and marshalling evidence can markedly benefit the claimant"⁹⁷ when less technical issues are at stake, and he attributes the lack of disadvantage to unrepresented claimants at the reconsideration stage to the importance of written medical reports, reviewed by doctors, in the reconsideration decisionmaking process.⁹⁸ Others conclude that representation is particularly appropriate in complex cases,⁹⁹ when additional reports must be obtained,¹⁰⁰ and when active investigation is required.¹⁰¹

After consideration of the respective roles of administrative law judges and representatives, a significant potential overlap appears between the two roles. Roles have been suggested for administrative law judges and representatives which cover both the development of a record and the presentation of a case and roles have been suggested for representatives that would, if performed, meet the major concerns about the administrative law judges' advocacy role. In the following section the manner in which administrative law judges actually exercise their responsibilities is examined from the courts' perspective in deciding whether a case should be remanded for further consideration when that decision is based on an evaluation whether a claimant's disability was determined on the basis of a complete record and following a full and fair hearing. The decisions show what aspects of representation, when omitted, are fundamental to the fulfillment of the minimum requirements of the disability determination process.

96. Popkin, *supra* note 1, at 1027.

97. *Id.*

98. *Id.* at 1026-27.

99. Yourman, *supra* note 19, at 135-38.

100. *Id.* at 168-69.

101. J. MASHAW, *et al.*, *supra* note 3, at 98.

C. *Satisfying the Minimum Requirements Without Representatives:
The Courts' Approach To Remands When Claimants Were
Unrepresented at Hearing*

The high rate of remands of disability decisions by the federal courts is evidence of the poor quality of the disability determination process.¹⁰² Although part of the blame can be laid on the broad language of section 205(g) of the Social Security Act, which authorizes remands,¹⁰³ and on the courts' eagerness to use the remand device to avoid deciding the merits one way or the other, the courts' approach, or more correctly stated, the courts' approaches, to remands when claimants were unrepresented at their disability hearing has contributed to the high remand rate. To the extent that the courts have good reason to order a large number of remands, the problem is indeed the poor quality of the hearing process and not an overuse of section 205(g). Remands are ordered not because a claimant was unrepresented, but rather because one aspect or another of the administrative law judge's (or absent representative's) advocacy role was not fulfilled. The great number of remands indicates that change is required to meet the advocacy needs of non-adversary hearings not met by the present system.

1. *Remands and Concern About Overuse*

Many commentators believe that the broad language of section 205(g), which allows for remands requested by the Secretary, by the claimant, or on the court's own motion, has led to an overuse of that relief.¹⁰⁴ Until recently, the Secretary had absolute authority to remand a case to an administrative law judge after a review proceeding had been filed in the district court, even before the government filed an answer.¹⁰⁵ This authority caused great concern because the ability to obtain a remand reduced the government's incentive to develop claims carefully and fully during all the pre-court stages of the process, including the administrative hearing.¹⁰⁶ The 1980 amendments to the Act

102. See notes 6-11 *supra* and accompanying text.

103. 42 U.S.C. § 405(g) (1976). See text accompanying notes 104-10 *infra*.

104. See generally J. MASHAW, *et al.*, *supra* note 3, at 132-36. Professor Mashaw feels that section 205(g) gives district courts "an almost unbounded discretion to set aside the administrative decision and order an enlargement of the record." *Id.* at 133.

105. See 42 U.S.C. § 405(g) (1976).

106. J. MASHAW, *et al.*, *supra* note 3, at 131-32. See also STAFF OF SUBCOMM. ON SOCIAL SECURITY, HOUSE COMM. ON WAYS AND MEANS, 95TH CONG., 2D SESS., DISABILITY INSURANCE—POSSIBLE AREAS OF SUBCOMMITTEE ACTION 9-10 (Comm. Print 1978).

attempt to deal with the problem by requiring the Secretary to show good cause.¹⁰⁷ Although a good cause requirement for remands requested by the claimant or ordered by the courts on their own motion has always existed,¹⁰⁸ the requirement has been applied in many different ways with no definitive interpretation available for the courts to use as a guide.¹⁰⁹ The recent amendments clarify the good cause requirement as it applies to the availability of new evidence as a basis for remand. Under the amendments one must now show that “there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding.”¹¹⁰

One basis for remands not affected by the 1980 amendments involve cases in which the claimant alleges that a full and fair hearing was not provided. Although the new amendments concerning remands could be thought to apply regardless of the quality of the original hearing, or the record developed before or at the hearing, the legislative history supports the view that the availability of remands because of a failure to provide the minimum requirements of a complete record and a full and fair hearing remains unaffected.¹¹¹ The confirmation of the lack of

107. See 1980 Amendments, *supra* note 2, § 307, 94 Stat. 458. The amendment is designed to meet these objections. See H.R. REP. NO. 96-100, 96th Cong., 1st Sess. 13 (1979) [hereinafter cited as 1979 House Report]; S. REP. NO. 96-408, 96th Cong., 1st Sess. 58 (1979) [hereinafter cited as 1979 Senate Report].

108. This language also was changed recently. See text accompanying note 110 *infra*. The language before the 1980 amendments was: “The court . . . may, at any time, on good cause shown, order additional evidence to be taken before the Secretary.” 42 U.S.C. § 405(g) (1976).

109. Good cause for a remand was found recently when substantial evidence did not exist to support the decision of the Secretary, *Currier v. Secretary of HEW*, 612 F.2d 594, 597 (1st Cir. 1980), when insufficient evidence existed to find for or against the claimant, *Johnson v. Harris*, 612 F.2d 993, 998 (5th Cir. 1980), without requiring that new evidence might affect the Secretary’s decision, *Strayhorn v. Califano*, 470 F. Supp. 1293, 1296 (E.D. Ark. 1979), and without any particular reason given, *Michel v. Califano*, 480 F. Supp. 195, 198 (M.D. La. 1979). Cf. *Webb v. Finch*, 431 F.2d 1179, 1180 (6th Cir. 1970) (McCree, J., dissenting) (“the fact that a more effective presentation could be made in a second effort is not the ‘good cause’ required by [Section 205(g)] as a predicate for remand”). See generally H. McCORMICK, *supra* note 20, §§ 752-58.

110. 1980 Amendments, *supra* note 2, § 307, 94 Stat. 458.

111. The House report states explicitly that the new amendment “is not to be construed as a limitation of judicial remands currently recognized under the law in cases which the Secretary has failed to provide a full and fair hearing, to make explicit findings, or to have correctly apply [sic] the law and regulations.” 1979 House Report, *supra* note 107, at 13. See also 1979 House Hearings, *supra* note 9, at 119 (statement by legal services attorneys urging that legislative history of remand amendments, which they supported generally, show that limitations do not apply where there was no full and fair hearing). Although the Senate report does not address this issue, it notes that many remands are justified and takes issue with those remands ordered “because the judge disagrees with the outcome of the case even though he would have to sustain it under the ‘substan-

full and fair hearing basis for remands supports the suggestion that remands correct, rather than pervert, the process. The new amendments, however, do not offer any better guide to determine whether a full and fair hearing was provided or whether a remand is required.

2. *Remand When Claimant Unrepresented at Hearing: General Rule*

Although a claimant can argue that a full and fair hearing was not provided despite the presence of a representative,¹¹² or on grounds unrelated to whether a representative was present,¹¹³ most such arguments are raised by claimants who were unrepresented at the original hearing. A lack of representation by itself, however, is not grounds for a remand.¹¹⁴ Such a rule is necessary as long as the right to representa-

tial evidence rule.' ” 1979 Senate Report, *supra* note 107, at 58. The case of *Parker v. Califano*, 441 F. Supp. 1174 (N.D. Cal. 1977), may be of a type that Congress had in mind. Although the claimant was represented at the hearing and the court found there was substantial evidence to support the decision to deny benefits, the case was remanded for further evidence because a new report by a clinical psychologist was presented that tended to show a greater psychological impairment than indicated on the record. *Cf.* *Williams v. Secretary of HEW*, 481 F. Supp. 69 (S.D.N.Y. 1979) (remand because tape recording of hearing inaudible).

Concern about a misuse of the “substantial evidence” rule in these cases also has surfaced as indicated by the quotation from 1979 Senate Report, *supra* note 107, at 58. *See also* STAFF REPORT, *supra* note 9, at 79-82. A proposal to require affirmance of the Secretary’s decisions unless “arbitrary and capricious” was adopted by the Senate as part of the 1980 amendments, but dropped in conference. *See* 1979 Senate Report, *supra* note 93, at 58-59; 1980 Conference Report, *supra* note 3, at 61. The administration also considered presenting a proposal limiting district court review of Social Security decision to questions of law or constitutional interpretation. *See* 1979 House Hearings, *supra* note 9, at 53-54, 69, 82. A related proposal for a special disability court was disavowed by the administration. *Id.* at 83.

112. *See* text accompanying note 94 *supra*.

113. Thus, many courts hold that a full and fair hearing is not provided when administrative law judges fail to support their decisions with a clear analysis of the relevant facts and laws. *See, e.g.,* *Stawls v. Califano*, 596 F.2d 1209, 1213 (4th Cir. 1979); *Storck v. Weinberger*, 402 F. Supp. 603, 608 (D. Md. 1975); *Davis v. Weinberger*, 390 F. Supp. 813, 816 (M.D. Pa. 1975). *Cf.* *Johnson v. Califano*, 434 F. Supp. 302, 308-09 (D. Md. 1977) (rejects argument that detailed statement of reasons and analysis of decision was required; claimant was represented at hearing by an attorney). Administrative law judges have been rebuffed for basing decisions on medical texts independent of the evidence in the record. *See* *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975); *Ross v. Gardner*, 365 F.2d 554, 558 (6th Cir. 1966). In *McCray v. Califano*, 483 F. Supp. 128 (M.D. La. 1980), the case was remanded because the administrative law judge based his decision on facts taken on administrative notice after the hearing. The claimant was represented and the court found the judge’s action defeated the purpose of representation since the attorney’s skills were “wasted.” *Id.* at 131.

114. *See, e.g.,* *Dobrowolsky v. Califano*, 606 F.2d 403, 407 (3d Cir. 1979); *Smith v. Secretary of HEW*, 587 F.2d 857, 860 (7th Cir. 1978).

tion is limited to the right to bring one's own representative, not to have a representative appointed and compensated by the government.¹¹⁵

Some courts express in general terms what must be shown in addition to a lack of representation at the original hearing to obtain a remand. Thus, a number of courts require that "a clear prejudice or unfairness" be shown;¹¹⁶ others look to whether a representative could have presented a better case.¹¹⁷ Despite instances in which courts effectively eliminate the requirement of an additional showing of harm by finding that the fact of nonrepresentation itself shows significant

115. There must be, of course, a waiver of the claimant's right to be represented. *Compare* Kennedy v. Finch, 317 F. Supp. 7, 8 (E.D. Pa. 1970) ("the lack of counsel is not a sufficient cause for remand. . . especially . . . where the claimant has affirmatively waived his right to counsel") with Schlabach v. Secretary of HEW, 469 F. Supp. 304, 311 (N.D. Ind. 1978) (waiver ineffective because had claimant "been able to understand the legal aspects and consequences of the proceeding, he probably would have retained counsel").

A waiver is particularly suspect if the claimant suffers from a mental condition. *See, e.g.,* Brenem v. Harris, 621 F.2d 688, 691 (5th Cir. 1980); Stawls v. Califano, 596 F.2d 1209, 1213 (4th Cir. 1979); Smith v. Secretary of HEW, 587 F.2d 857, 860 (7th Cir. 1978). *Cf. Vega v. Secretary of HEW*, 321 F. Supp. 553, 554 (D.P.R. 1970) (claimant with mental condition afforded the opportunity to bring counsel but chose to appear alone).

Many courts hold that a waiver is ineffective unless the claimant is informed of all sources of free legal services that may be available. *See, e.g.,* Brooks v. Califano, 440 F. Supp. 1341, 1345 (D. Del. 1977); Clemmons v. Weinberger, 416 F. Supp. 623, 625 n.1 (W.D. Mo. 1976); Rosa v. Weinberger, 381 F. Supp. 377, 381 (E.D.N.Y. 1974). *Cf. Reed v. Califano*, 489 F. Supp. 1026 (E.D. Tenn. 1980) (brochure describing various sources of representation held sufficient); Clark v. Califano, 476 F. Supp. 1056 (N.D. Ga. 1979) (mailed notice indicating claimant would be supplied list of attorneys if wanted representation and could not afford it, held sufficient). *See also* Flores v. Department of HEW, 465 F. Supp. 317, 321 n.3 (S.D.N.Y. 1978) ("the examiner could have been more helpful" as he did not respond when claimant indicated that no attorney was present because he could not afford one).

The Tenth Circuit implied recently that courts requiring a knowing waiver of free representation would remand only if the hearing was otherwise incomplete or unfair. *Garcia v. Califano*, 625 F.2d 354, 356 (10th Cir. 1980). On the other hand, an effective waiver does not preclude a remand when there has not been a full and fair hearing. *See, e.g., Fessler v. Mathews*, 417 F. Supp. 570, 574 (S.D.N.Y. 1976), in which the court indicated the administrative law judge had "duly noted" that the claimant was entitled to be represented yet she indicated she would proceed without assistance; nonetheless, the court remanded the case because a complete record had not been compiled.

116. *See, e.g., Hess v. Secretary of HEW*, 497 F.2d 837, 840 n.4 (3d Cir. 1974); *Goodman v. Richardson*, 448 F.2d 388, 389 (5th Cir. 1971); *Sykes v. Finch*, 443 F.2d 192, 194 (7th Cir. 1971).

117. *See Brooks v. Califano*, 440 F. Supp. 1341, 1345 (D. Del. 1977) ("no showing that the record . . . was not fully developed, or that there are serious information gaps in the record which could have been filled had counsel been present"); *Acevedo v. Secretary of HEW*, 372 F. Supp. 455, 459 (D.P.R. 1973) ("no suggestion that having counsel would have resulted in the presentation of a better case"); *Truss v. Richardson*, 338 F. Supp. 741, 743 (E.D. Mich. 1971) ("the record reflects that [claimant's] interests were fully represented").

prejudice,¹¹⁸ the clear weight of authority requires a specific indication of how the particular claimant was harmed by being unrepresented. The claimant must show how the administrative law judge failed to provide for the development of a complete record and the presentation of a full and fair hearing.

3. *Remands When Claimants Unrepresented at Hearings: Circumstances Required to Take Case Out of General Rule*

The question of whether a claimant was prejudiced or otherwise disadvantaged by lack of representation has been approached by viewing the original hearing from one or both of two different perspectives: One focuses on the quality of the two major actors, the administrative law judge and the claimant, and evaluates whether the judge was biased or otherwise unfair, or whether the claimant was incompetent; the second focuses on the hearing itself, and inspects whether the record was developed and the case presented adequately.¹¹⁹

Courts remand cases in which the administrative law judge was biased or unfair, or in which an unrepresented claimant was truly incompetent, with just the slightest showing of harm. Thus, a court recently found that an unrepresented claimant's position was not properly presented at the hearing because the administrative law judge repeatedly addressed a fifty-three year old claimant by his first name.¹²⁰

118. Thus, in *Goforth v. Cohen*, 290 F. Supp. 590, 592 (D.S.C. 1968), the court, without considering the evidence that might be presented on remand, found that because the claimant had retained counsel, "remand is necessary in order to allow him to render his services." Similarly, the court in *Clemmons v. Weinberger*, 416 F. Supp. 623, 626 (W.D. Mo. 1976), did not review any evidence in the record since "[i]t is apparent from the record that [the claimant's] lack of representation inhibited presentation of her claim and prejudiced her case." *Cf.* *Webb v. Finch*, 431 F.2d 1179, 1180 (6th Cir. 1970) (McCree, J., dissenting) ("It would be an unusual case which could not be buttressed by additional testimony, the absence of which is indicated by an adverse decision.")

119. The cases discussed in this section involve the issue of whether a remand is required. Courts look to a lack of representation, coupled with essentially the same additional circumstances outlined below, for refusing to apply administrative *res judicata*, *Coulter v. Weinberger*, 527 F.2d 224, 228 (3d Cir. 1975); *Staskel v. Gardner*, 274 F. Supp. 861, 865 (E.D. Pa. 1967), and for heightening the level of care with which the courts themselves review the record. *See Cullison v. Califano*, 613 F.2d 55, 58 (4th Cir. 1980); *Brittingham v. Weinberger*, 408 F. Supp. 606, 611 (E.D. Pa. 1976).

Unless indicated otherwise, the cases in this section involve instances in which the claimant was unrepresented at the original hearings.

120. *Fabozzi v. Secretary of HEW*, [1980 Soc. Sec. Transfer Binder] UNEMPL. INS. REP. (CCH) ¶ 16992 (E.D.N.Y.). The entire substantive portion of Judge Weinstein's Order was as follows:

[T]he Court notes and brings to the attention of the appropriate authorities that the Administrative Law Judge ("ALJ") herein repeatedly referred to the [claimant] as

Other cases have noted a lack of “solicitousness” on the part of the administrative law judge, a judge’s excessive concern with facts not helpful to the claimant, the “biased manner” of the hearing, and the “cursory” nature of a hearing conducted by an administrative law judge and the judge’s determination of the merits of the claim.¹²¹ A decision to remand based on incompetence of the claimant is usually founded on limited education, the existence of a mental condition, or both; in these cases courts usually find that as a result the claimant was unable to understand the proceedings or present evidence effectively.¹²²

“Saverio”, the first name of [the claimant], in addressing him. The Court believes this to be inappropriate for at least two reasons: first, it treats this 53 [year] old [claimant] in a condescending manner, and second, it misleads the [claimant] into believing that the ALJ is [claimant’s] friend. The ALJ is an impartial adjudicator

Id.

Judge Weinstein ordered further that the case be assigned to a different administrative law judge on remand. *Id.*

121. See *Gold v. Secretary of HEW*, 463 F.2d 38, 43-44 (2d Cir. 1972) (court noted administrative law judge’s particular concern in his questioning about facts not helpful to the claimant); *Melendez v. Secretary of HEW*, [1980 Soc. Sec. Transfer Binder] UNEMPL. INS. REP. (CCH) ¶ 16884 (E.D.N.Y.) (39 minute hearing with decision filed two days later “was cursory and fell far short of the legal requirements that the record be fully and fairly developed when a claimant is not represented by counsel”); *Diaz v. Secretary of HEW*, 372 F. Supp. 399, 401 (D.P.R. 1973) (“This Court expects a certain degree of solicitousness from the hearing examiner when a claimant is not aided by counsel”); *Coyle v. Gardner*, 298 F. Supp. 609, 615 (D. Hawaii 1969) (extensive evidence of “the biased manner in which the hearing was held”). Cf. *Hunley v. Cohen*, 288 F. Supp. 537, 541 (E.D. Tenn. 1968) (no bias shown despite the fact that “the Examiner may have tried overly hard to bring out [expert] testimony in a certain way,” since “the Examiner also brought out adverse testimony [relative to the government’s case] concerning the difficulty [the claimant] might have in obtaining employment”); *Rauch v. Gardner*, 267 F. Supp. 4, 6-7 (E.D. Wis. 1967) (administrative law judge did not create a hostile atmosphere by warning the claimant of the consequences of perjury). See generally *Floyd v. Finch*, 441 F.2d 73, 77, 90-99 (6th Cir. 1971) (McAllister, J., dissenting). See also *Copley v. Richardson*, 475 F.2d 772, 774 (6th Cir. 1973) (the administrative law judge should not “employ expert questioning to write a record exclusively favorable to the government’s side of the case”); *Mickelson v. Califano*, [1980 Soc. Sec. Transfer Binder] UNEMPL. INS. REP. (CCH) ¶ 17015 (D. Minn.) (the administrative law judge “is not the Secretary’s advocate”).

An administrative law judge can be requested to withdraw from a case. 45 Fed. Reg. 52085 (1980) (to be codified in 20 C.F.R. § 404.940). Failure to do so may be a waiver of objections to the judge’s conduct. See *Ginsburg v. Richardson*, 436 F.2d 1146, 1151-52 (3d Cir.), *cert. denied*, 402 U.S. 976 (1971).

122. See, e.g., *Cullison v. Califano*, 613 F.2d 55, 58 (4th Cir. 1980) (should take “special account” of mental or emotional disability “which can effectively disable a claimant from substantiating her claim”); *Currier v. Secretary of HEW*, 612 F.2d 594, 598 (1st Cir. 1980) (administrative law judge could not rely on the “skimpy evidence . . . presented by the uncounselled and mentally impaired [claimant]”); *Michel v. Califano*, 480 F. Supp. 195, 198 (M.D. La. 1979) (limited education, medical evidence was presented “piecemeal”); *Pinkowski v. Califano*, 472 F. Supp. 318, 321 (E.D. Wis. 1979) (limited education, “showed difficulty comprehending what was ex-

Courts also look to claimants' mental condition and education in terms of their ability to understand the need for representation,¹²³ and some have suggested that claimants with mental conditions be represented on remand.¹²⁴

The cases that involve the adequacy of representation in the hearing process are more complex. Given the general rule that lack of representation is not, by itself, a ground for remand and the various indefinite standards that have been presented for judging whether a claimant, despite a lack of representation, was afforded a full and fair hearing, courts have found it necessary to look to the specific circumstances of the hearing to determine whether a remand for further proceedings would be appropriate. Although some have attempted to list those circumstances that warrant a remand,¹²⁵ no comprehensive list can be developed by categorizing according to the specific circumstances involved. First, the list would be too broad because individual judges vary considerably in evaluating the importance of particular cir-

pected of her"); *Berry v. Califano*, 471 F. Supp. 446, 448 (E.D. Wis. 1979) (limited education, "highly questionable whether the claimant was able to adequately present his case pro se"); *Medina v. Secretary of HEW*, 372 F. Supp. 465, 468 (D.P.R. 1973) (limited education, unable to understand the "technicalities" of the proceedings); *Alamo v. Richardson*, 355 F. Supp. 314, 317 (D.P.R. 1972) (mental condition, hearing "too technical for him to fully understand").

Other courts have looked more directly at the result of claimant's effort. *See, e.g., Webb v. Finch*, 431 F.2d 1179, 1180 (6th Cir. 1970) (claimant "sought, with obvious ineffectiveness, to represent himself without the aid of counsel and hampered by lack of education"); *Hennig v. Gardner*, 276 F. Supp. 622, 625 (N.D. Tex. 1967) ("The record amply reflects [the claimant's] inability to present both herself and her cause."). *See also Guevarez v. Califano*, [1980 Soc. Sec. Transfer Binder] UNEMPL. INS. REP. (CCH) ¶ 17027 (S.D.N.Y.), in which the court noted that claimant's opportunity to respond to a post hearing report was "somewhat artificial in view of the fact that the claimant was both illiterate and without counsel." *Id.* at 2499-138.

123. *See Smith v. Secretary of HEW*, 587 F.2d 857, 859 (7th Cir. 1978) (claimant with mental condition "did not understand the role that a lawyer would play"); *Brandt v. Califano*, 470 F. Supp. 795, 798 (E.D. Wis. 1979) (claimant with limited education was ignorant of the consequence of her failure to appear at the hearing). *See also Coyle v. Gardner*, 298 F. Supp. 609, 614 (D. Hawaii 1969) (administrative law judge criticized for discouraging wife of claimant with only first grade education from representing him).

124. *See, e.g., Brenem v. Harris*, 621 F.2d 688, 690-91 (5th Cir. 1980); *Medina v. Secretary of HEW*, 372 F. Supp. 465, 469 (D.P.R. 1973); *Roman v. Secretary of HEW*, 355 F. Supp. 646, 650 (D.P.R. 1972). *Cf. Hicks v. Mathews*, 424 F. Supp. 8, 10 (D. Md. 1976) (claimant not "so emotionally handicapped and so 'out of it' that she *per se* is entitled to be provided with counsel free of charge to her, and who, without such representation, is unable to receive a fair hearing").

125. *See, e.g., Parker v. Califano*, 441 F. Supp. 1174, 1179 (N.D. Cal. 1977); *Tillman v. Weinberger*, 398 F. Supp. 1124, 1129 (N.D. Ind. 1975). The listing in *Parker* includes 10 factors considered relevant, with the representation of the claimant, and the quality of such representation, if any, as two of the 10 factors.

cumstances.¹²⁶ Second, although some cases point to only one specific circumstance as a basis for remand, most include two or more circumstances which indicated that a full and fair hearing was not provided. Even when only one circumstance is relied on, there is often a finding of seriousness that aggravates the specific circumstance without which that one circumstance might not be sufficient.¹²⁷ Finally, because of the highly individual nature of the judges and the hearings under review, the list would be forever incomplete.

A meaningful analysis of the cases ordering remands in which claimants were unrepresented can be made by examining their one, clear common denominator: In each case the administrative law judge failed to fulfill at least one aspect of the role expected of administrative law judges in non-adversary disability hearings. Cases are remanded if the administrative law judge did not develop a complete record or did not assure the full and fair presentation of the claim. For purposes of this analysis the development and presentation responsibilities of the administrative law judge each can be subdivided into two categories. Thus, the cases discussed below are divided into four groups, each reflecting a responsibility that someone must fulfill to assure that an unrepresented claimant receives a full and fair hearing: the development and compilation of documentary evidence, the development of a list of witnesses, the presentation of bases of disability according to applicable law, and the presentation of live testimony by witnesses, including the claimant.

The development and presentation aspects of the process do not represent separate and distinct steps in any chronological sense. The de-

126. See J. MASHAW, *et al.*, *supra* note 3, at 133:

[J]udges vary widely in their application of the good cause standard . . . [R]emands are sometimes granted on the basis of new evidence alone, sometimes on the basis of new evidence plus lack of counsel, and sometimes on the basis of lack of counsel plus new evidence plus other indication of prejudice.

127. Thus, in *Diabo v. Secretary of HEW*, 627 F.2d 278 (D.C. Cir. 1980), the court remanded a case in which the claimant was unrepresented, citing a number of "errors" by the administrative law judge. In a concurring opinion, Judge Tamm remarked, "I do not read the opinion of the court as holding that each of the errors cited, if taken alone, would have been a sufficient ground for remand." *Id.* at 284 (Tamm, J., concurring). Judge Tamm also added, however, that "[g]iven a set of facts that would present a single one of these mistakes in stark relief, we very well might conclude that it alone is enough to justify a remand." *Id.* (Tamm, J., concurring). In *Landess v. Weinberger*, 490 F.2d 1187 (8th Cir. 1974), the court pointed to the single fact that the unrepresented claimant's treating physician submitted incomplete records, but also remarked that an attempt to determine a disability without a complete report of someone who had examined the claimant "is medical sophistry at its best." *Id.* at 1190.

velopment aspects do tend to occur before the hearing; a list of witnesses is prepared and most of the documentary evidence is compiled before the hearing takes place. The presentation aspects occur either at the hearing, in the case of questioning witnesses, or near the hearing. When presenting the legal theories of disability, however, the task of developing a complete record cannot be concluded until the case is fully presented. Thus, one cannot know whether all relevant evidence has been presented, and all relevant witnesses called and fully questioned until one knows the claimant's legal bases of disability.¹²⁸ Because the major development effort occurs before the case can be prepared for presentation, the development aspects are considered first. Although failure to develop a record and present witnesses relates directly to a co-existing incomplete presentation of the legal claim, most of the circumstances discussed below concerning development and presentation of witnesses justify a remand independent of an incomplete presentation of the legal claim. On the other hand, most cases with an incomplete presentation of the legal claim also require a remand for the development and presentation of further evidence.¹²⁹

a. Development—Compilation of Documentary Evidence

In disability cases, most documentary evidence, and virtually all such evidence that is in dispute, relates to the claimant's medical condition.¹³⁰ Therefore, although some cases on remand refer to missing

128. Thus, the court may well state, as it did in *Heinitz v. Califano*, 428 F. Supp. 940, 950 (W.D. Mo. 1977), that an administrative law judge "is under a duty to elicit and gather such evidence, if it exists, as will enable him to resolve the material factual issues." The question remains, what are the material factual issues?

129. Of course, a record possibly will contain any evidence necessary to resolve a legal basis of disability that had not been presented at the hearing. In some instances, courts will grant or deny benefits without remanding for further consideration by the administrative law judge. *See, e.g.*, *Rayborn v. Weinberger*, 398 F. Supp. 1303, 1311 (N.D. Ind. 1975), in which court awarded benefits on the basis of a mental condition ignored by the administrative law judge, finding "abundant evidence" in the record on that issue, even though had the claimant been represented it would be "very reasonable to believe that a fairer record would have been made." More often, however, a remand is ordered, if only for the administrative law judge to reconsider the evidence already in the record. *See, e.g.*, *Sharpe v. Califano*, 438 F. Supp. 1282, 1286 (E.D. Va. 1977) (although the evidence was in the record, case was remanded because the administrative law judge "made no apparent effort to evaluate the evidence of [the claimant's] alcohol abuse in light of the [applicable] regulations."). *Rosa v. Weinberger*, 381 F. Supp. 377, 380-81 (E.D.N.Y. 1974) (case remanded when the record included both objective and subjective medical evidence but the administrative law judge failed to consider the subjective evidence).

130. *See generally* J. MASHAW, *et al.*, *supra* note 3, at 49-64.

nonmedical documentary evidence,¹³¹ the question of the effect of missing documentary evidence on a request for remand by a previously unrepresented claimant can be examined in detail only with respect to medical evidence.¹³²

Some courts simply apply a general rule on development that administrative law judges must assure the inclusion of all relevant facts into the record, and remand whenever additional medical evidence exists which might have produced a favorable decision for the claimant.¹³³ Most courts realize, however, that administrative law judges cannot "search out all the relevant evidence which might be available,"¹³⁴ and require an additional showing beyond the existence of an incomplete medical record. This showing, which distinguishes "run of the mill cases" in which a special responsibility does not exist,¹³⁵ amounts to a

131. See, e.g., *Brandt v. Califano*, 470 F. Supp. 795, 797-98 (E.D. Wis. 1979) (case remanded to consider additional evidence, including reports from state vocational rehabilitation department concerning claimant's vocational capacity); *Warmijak v. Califano*, 465 F. Supp. 441, 444 (E.D. Pa. 1979) (absence of vocational report or other vocational evidence).

132. Remand is the only relief available in these cases because the courts cannot consider new evidence relative to the merits of the claim. See *Parks v. Harris*, 614 F.2d 83, 84-85 (5th Cir. 1980).

133. A broad application of the general rule is found in *Webb v. Finch*, 431 F.2d 1179, 1180 (6th Cir. 1970), a 2-1 decision in which the majority deemed "representations made to the Court by [claimant's] counsel that there is additional evidence [of the disability] which might produce a different result," coupled with the fact that the claimant, assisted at the hearing only by a friend, "sought, with obvious ineffectiveness, to represent himself," a sufficient basis for remand. Cf. *id.* (McCree, J., dissenting) ("It would be an unusual case which could not be buttressed by additional testimony, the absence of which is indicated by an adverse decision."). The Fourth Circuit expressed a similar idea recently in *Cullison v. Califano*, 613 F.2d 55, 58 (4th Cir. 1980), indicating a remand may be proper when new evidence is presented that "might reasonably" lead to a different decision. See also *Hamm v. Richardson*, 324 F. Supp. 328, 331 (N.D. Miss. 1971) (citing an "inconclusive" medical record that "leaves much to be desired in terms of objective medical findings").

Often it is unclear whether the additional evidence was available at the time of the hearing. See *Hicks v. Mathews*, 424 F. Supp. 8, 9-10 (D. Md. 1976) (additional evidence "was either not available, or, whether or not it was available, was not presented to" the administrative law judge). But see *Torres v. Secretary of HEW*, 337 F. Supp. 1329, 1332 (D.P.R. 1971) (remand based on the existence of additional medical evidence "which was available but was not produced at the hearing"). Presumably these are the types of cases that will receive greater scrutiny in light of the 1980 amendments before remands are ordered. See text accompanying notes 107-10 *supra*. In *Torres*, however, the amendments might not have made a difference because the court noted that the claimant was unrepresented and indicated that the evidence was available because it was used in a damages case arising out of the same accident that produced the alleged disability. *Id.* at 1332. See text accompanying note 139 *infra*.

134. *Hess v. Secretary of HEW*, 497 F.2d 837, 840 (3d Cir. 1974).

135. See *Currier v. Secretary of HEW*, 612 F.2d 594, 598 (1st Cir. 1980), in which the court, after listing reasons why the administrative law judge should have compiled a record to include

finding that the development responsibilities of the administrative law judge were not fulfilled.

One set of cases concerns incomplete development caused by the simple carelessness or incompetence of the administrative law judge. Thus, courts have remanded cases when the records are illegible,¹³⁶ when relevant reports are excluded from the record on the basis of a careless misreading,¹³⁷ and when reports in the record fail to indicate whether an opinion is based on a personal examination.¹³⁸ Similarly, courts have remanded cases in which the administrative law judge could have completed the record without much difficulty,¹³⁹ and have noted occasionally that the judge could have met the responsibility by merely identifying the deficiency and asking the claimant to supply the additional evidence.¹⁴⁰

Another set of cases involves situations in which the administrative law judge fails to compile an adequate documentary record even though information is already in the file which indicates a need for further evidence. The indication of need can be general,¹⁴¹ but more often there is a specific basis for determining that the judge should have

reports from doctors, social workers, and other "key witnesses," "emphasize[d] that we do not see such responsibilities arising in run of the mill cases."

136. *See, e.g.*, *Cutler v. Weinberger*, 516 F.2d 1282, 1285 (2d Cir. 1975) (claimant represented by nonattorney; medical records illegible "because of the poor quality of the reproduction, the handwriting of the physician, or both"); *Rosado v. Richardson*, 372 F. Supp. 469, 470-71 (D.P.R. 1973) (medical records "hard to read, and we question whether the Secretary might not have been able to secure more legible copies"); *Machen v. Gardner*, 319 F. Supp. 1243, 1245 (E.D. Tenn. 1968) (handwritten reports "a classic example of the illegible handwriting of medical doctors").

137. *Diabo v. Secretary of HEW*, 627 F.2d 278, 282 (D.C. Cir. 1980) (assumed disability reports from insurance company were vouchers, without examining them).

138. *Johnson v. Harris*, 612 F.2d 993, 998 (5th Cir. 1980).

139. *See, e.g.*, *Currier v. Secretary of HEW*, 612 F.2d 594, 598 (1st Cir. 1980) ("within the power of the administrative law judge, without undue effort, to see that the gaps [in the medical record] are somewhat filled—as by ordering easily obtained further or more complete [medical] reports"); *Crowder v. Gardner*, 249 F. Supp. 678, 680 (D.S.C. 1966) ("it appears that . . . a bit more development will probably enable [the claimant] to satisfactorily carry his burden of proof").

140. Thus, in *Steimer v. Gardner*, 395 F.2d 197, 199 (9th Cir. 1968), the court affirmed the decision of the administrative law judge who had "more than once indicated to [the claimant] that more information, specially from [the treating physician], would be helpful." *Cf. Erwin v. Secretary of HEW*, 312 F. Supp. 179, 185 (D.N.J. 1970) (remand ordered despite the fact that the administrative law judge "did his utmost to assist [claimant], particularly in the matter of obtaining all relevant [medical] information."). *See also Warmijak v. Califano*, 465 F. Supp. 441, 444 (E.D. Pa. 1979) ("incumbent upon the Secretary at least to advise the claimant that he should amplify the medical evidence").

141. *See, e.g.*, *Prewitt v. Celebreeze*, 330 F.2d 93, 95 (6th Cir. 1964) (in light of claimant's

realized the need to develop further medical evidence. Thus, courts have remanded cases in which evidence in the record points to obvious sources for additional relevant information, such as full reports from the claimant's physician and records from hospitals where the claimant had been a patient.¹⁴² Similarly, the absence of supplemental medical evidence necessary to update existing evidence or suggested in an existing report has led to a remand.¹⁴³

Finally, courts have remanded cases for compilation of further medical evidence when the record indicates that such evidence should be developed in order to resolve a particular issue involved in the claim. One example is when the evidence in the record fails to cover the period before the claimant's special insured status lapsed,¹⁴⁴ which is an issue that should be obvious to the administrative law judge. Other particular issues insufficiently covered by the medical record that have warranted a remand include the existence of specific disabling conditions,¹⁴⁵ or the existence of specific evidence necessary to prove a dis-

"obvious inability to pursue his normal work," case should not be decided on the basis of a medical record deemed "meager" and "not extensive").

142. See *Johnson v. Harris*, 612 F.2d 993, 998 (5th Cir. 1980) (no reports in the record from the claimant's treating physician); *Hess v. Secretary of HEW*, 497 F.2d 837, 841 (3d Cir. 1974) (same). In *Thorne v. Califano*, 607 F.2d 218 (8th Cir. 1979), the court remanded for further evidence, including a more complete report from the claimant's treating physician, although the claimant was represented by an attorney at the hearing. The court remarked, "without intending criticism of claimant's counsel, we felt counsel should have been prepared to submit [more complete] reports from treating physicians." *Id.* at 219 n.3. See also *Heinitz v. Califano*, 428 F. Supp. 940, 950 (W.D. Mo. 1977) (necessary additional evidence might have come "from the same physicians who have rendered the abbreviated medical reports which are currently in the . . . record"). Relevant hospital records were missing in *Flores v. Department of HEW*, 465 F. Supp. 317, 325 (S.D.N.Y. 1978), despite the claimant's statement to the Social Security Administration that he had been treated at a particular hospital and had told the administrative law judge that he was under medication from doctors at the hospital. Hospital records were also incomplete in *Guevarez v. Califano*, [1980 Soc. Sec. Transfer Binder] UNEMPL. INS. REP. (CCH) ¶ 17027 (S.D.N.Y.), in which patient records had not been requested because of the administrative law judge's "gratuitous assumption" that the claimant had been treated only as an out-patient.

143. See *Frappier v. Secretary of HEW*, [1980 Soc. Sec. Transfer Binder] UNEMPL. INS. REP. (CCH) ¶ 17039 (D. Minn.) (failure to order test recommended in report already in file); *Bachels v. Califano*, [1979-80 Transfer Binder] UNEMPL. INS. REP. (CCH) ¶ 16382 (N.D. Cal. 1978) (need for more current medical evidence).

144. See, e.g., *Johnson v. Richardson*, 486 F.2d 1023, 1025 (8th Cir. 1973); *Rosado v. Richardson*, 372 F. Supp. 469, 471 (D.P.R. 1973). See also text accompanying note 157 *infra*.

145. See, e.g., *Landess v. Weinberger*, 490 F.2d 1187, 1188-89 (8th Cir. 1974) (record failed to cover complaints of arthritis); *Hicks v. Mathews*, 424 F. Supp. 8, 10 (D. Md. 1976) (additional records from mental hospital necessary when mental condition not discussed at hearing). See also text accompanying notes 155-57 *infra*.

abling condition.¹⁴⁶ These cases, particularly those involving more subtle or hidden issues, relate to the cases discussed below concerning the presentation of the claimant's legal case.¹⁴⁷

b. Development—Calling Witnesses

The claimant is the primary witness in any disability hearing, and therefore no effort is required to produce the primary witness.¹⁴⁸ Courts remand cases, however, when other relevant witnesses are not called. Thus, records have been found to be incomplete when witnesses who could testify concerning a claimant's medical condition or unsuccessful attempts to work at a former job were not called,¹⁴⁹ and when the administrative law judge discouraged the presentation of witnesses brought by the claimant to the hearing to testify on her behalf.¹⁵⁰

Many missing witness cases involve vocational experts. Typically, the administrative law judge finds without expert testimony that the claimant cannot perform any relevant former work but can perform other suitable work. In these cases, many courts require expert testimony in order to find against the claimant, particularly when the claimant is unrepresented.¹⁵¹ Although a remand order temporarily

146. See, e.g., *Veal v. Califano*, 610 F.2d 495, 497 (8th Cir. 1979) (insufficient medical evidence to meet legal standard for disability on the basis of alcoholism); *Miranda v. Secretary of HEW*, 514 F.2d 996, 999-1000 (1st Cir. 1975) (inadequate record on claimant's pain as proof of disability). See also text accompanying notes 159-60 *infra*.

147. See text accompanying notes 153-60 *infra*.

148. Of course, the claimant does not have to appear. See 45 Fed. Reg. 52086 (1980) (to be codified in 20 C.F.R. § 404.950(b)). An issue may arise concerning the effectiveness of this waiver when the claimant was unrepresented. See *Skenandore v. Califano*, 473 F. Supp. 1362, 1363 (E.D. Wis. 1979) (waiver of right to appear and present evidence at hearing "indicates [the claimant] did not know how to best appeal the denial of benefits").

149. See *Gold v. Secretary of HEW*, 463 F.2d 38, 43-44 (2d Cir. 1972) (administrative law judge should have called witnesses regarding claimant's medical condition when judge considered case unpersuasive); *Fessler v. Mathews*, 417 F. Supp. 570, 575 (S.D.N.Y. 1976) (judge should have called former employer who could have testified easily in person or by affidavit because it was a local business). Cf. *Cutler v. Weinberger*, 516 F.2d 1282, 1286 (2d Cir. 1975) ("it was incumbent upon the administrative law judge to emphasize the desirability of producing, and to afford an opportunity to produce expert [vocational and medical] testimony"). See also *Stewart v. Cohen*, 309 F. Supp. 949, 956 (E.D.N.Y. 1970) (administrative law judge had duty to call "material witnesses of whom he knew," such as the claimant's vocational counselor).

150. See *Clemmons v. Weinberger*, 416 F. Supp. 623, 626 (W.D. Mo. 1976) (claimant told "witnesses normally aren't all that meaningful in this type of case"). Cf. *Guzman v. Califano*, 480 F. Supp. 735, 736 (S.D.N.Y. 1979) (court declined to fault judge for not calling claimant's daughter to corroborate claimant's testimony since "[t]he ALJ told [the claimant] . . . that she could introduce evidence. How much further must (or should) the hearing officer go?").

151. The Eighth Circuit has clearly stated the expert testimony requirement. See *Willem v.*

removes a decision unfavorable to the claimant, the failure to produce a vocational expert relates to the administrative law judge's responsibility to assure that the record is also complete relative to the government's case.¹⁵²

c. Presentation—Legal Bases of Disability

Because substantive Social Security disability law is complex and vague, it is a difficult and often subjective task to evaluate whether a claimant's legal bases of disability had been presented properly. Nevertheless, courts examine whether an administrative law judge assured the proper presentation of a claimant's case. This is one area, however, in which general rules have little meaning. What does it mean, for example, to state that "all arguable bases" of disability must be explored, or only "likely possibilities" need be examined fully? Although some courts attempt to establish guidelines,¹⁵³ the courts in most cases investigate the existing record of the hearing and decide whether the claim was properly presented. Thus, although a few cases note the closeness or difficulty of the issues,¹⁵⁴ courts generally are concerned with whether a particular disability was not presented that should have been considered, or whether a particular disability that was presented was presented fully.

Richardson, 490 F.2d 1247, 1248-49 (8th Cir. 1974); *Johnson v. Richardson*, 486 F.2d 1023, 1025 (8th Cir. 1973); *Garrett v. Richardson*, 471 F.2d 598, 603 (8th Cir. 1972). *Cf.* *Hall v. Secretary of HEW*, 602 F.2d 1372, 1377 (9th Cir. 1979) (although vocational expert not required, facts must be developed diligently when claimant unrepresented). *See also* *Sexton v. Califano*, [1980 Soc. Sec. Transfer Binder] UNEMPL. INS. REP. (CCH) ¶ 16885 (E.D. Ark. 1979); *Terry v. Mathews*, 427 F. Supp. 464, 466 (E.D. Pa. 1976) (remand because witness was psychologist without qualifications to be a vocational expert).

152. A vocational expert is considered a neutral witness. A vocational expert is used, however, to meet the government's burden after the claimant has shown an inability to engage in vocationally relevant past work. *See* text accompanying notes 33-38 *supra*. *Cf.* *Borrero Arce v. Finch*, 307 F. Supp. 1071, 1074-75 (D.P.R. 1969) (court rejected the claimant's argument that calling a vocational expert to help prove the government's case was an indication of the administrative law judge's lack of impartiality).

153. *Compare* *Brittingham v. Weinberger*, 408 F. Supp. 606, 611 (E.D. Pa. 1976) ("While [the duty to insure a fair and thorough hearing] requires the administrative law judge to maintain his or her objectivity, it also suggests an obligation . . . to assist an unrepresented claimant by explaining . . . the way in which evidence of the claimant's disability might best be presented.") *with* *Hicks v. Mathews*, 424 F. Supp. 8, 10 (D. Md. 1976) (administrative law judge need not explore every basis, but should develop the "strength of a [claimant's] contentions").

154. *See, e.g.,* *Pinkowski v. Califano*, 472 F. Supp. 318, 321 (E.D. Wis. 1979) ("case was a difficult one to present"); *Erwin v. Secretary of HEW*, 312 F. Supp. 179, 185 (D.N.J. 1970) ("In a close case of this kind [being unrepresented] placed [the claimant] at a disadvantage.").

A large number of cases involve the failure of an administrative law judge to inquire into a psychological basis for disability. In some of these cases the courts find that the existence of a mental condition is "obvious" or "undisputed" from the existing record.¹⁵⁵ In most of the others, the courts can point to at least some indication that the administrative law judge should have known that further inquiry was required.¹⁵⁶ Remands also result from the failure of administrative law judges to explore apparent physical impairments as potential bases of disability. In these cases, courts also analyze the record before the administrative law judge for an indication of the possible existence of an unexplored impairment. When the existence of an unexplored physical impairment is indicated in the record, courts have ordered a remand because it appeared the impairment might meet the requirements of one or more of the disabilities listed in the federal regulations, or, even though the evidence did not seem to show that the requirements of a particular listed impairment could be met, it appeared that further development might enable the claimant to establish disability because of the cumulative effect of a number of impairments.¹⁵⁷

155. See *Smith v. Secretary of HEW*, 587 F.2d 857, 861 (7th Cir. 1978) ("record . . . replete with undisputed evidence of the [claimant's] mental as well as physical breakdown"); *Medina v. Secretary of HEW*, 372 F. Supp. 465, 467-68 (D.P.R. 1973) ("obvious" mental condition should have been explored); *Alamo v. Richardson*, 355 F. Supp. 314, 317 (D.P.R. 1972) ("when a claimant appears without counsel at the administrative hearing and the presence of a mental impairment is obvious, . . . it is the duty of the hearing examiner to adequately explore all aspects of the claim before him").

156. See, e.g., *Strayhorn v. Califano*, 470 F. Supp. 1293, 1296 (E.D. Ark. 1979) ("several indications in the record that [the claimant's] complaints of pain and stiffness were primarily psychosomatic in origin"); *Hicks v. Mathews*, 424 F. Supp. 8, 9-10 (D. Md. 1976) (evidence of mental problem in record "not by any means weak"); *de Leon v. Secretary of HEW*, 337 F. Supp. 905, 907 (D.P.R. 1972) (consulting neurologist recommended psychiatric examination). In *Garcia v. Califano*, 625 F.2d 354, 356 (10th Cir. 1980), the court refused to remand a case for further psychological evidence because administrative law judges "need not inquire into matters apparently unrelated to the claim," without reconciling that statement with the fact that a report indicating the claimant's depression was in the record. *Id.* at 355. Cf. *Bishop v. Weinberger*, 380 F. Supp. 293, 297 (E.D. Va. 1974) (no evidence of a mental impairment was introduced into the record at the hearing, and the court found no error in the administrative law judge's failure to inquire into the issue; nonetheless, the court ordered a remand, noting "not the least of [the court's] concern is the fact . . . that the [claimant] was not represented").

157. See, e.g., *Diabo v. Secretary of HEW*, 627 F.2d 278, 282 (D.C. Cir. 1980) (failure to explore evidence of cumulative effect); *Livingston v. Califano*, 614 F.2d 342, 346 (3d Cir. 1980) (failure to inquire further into the listed requirements for active rheumatoid arthritis, despite "clear signs" in the existing record that the claimant had the disease; court noted that the administrative law judge "failed to inquire properly into the claimant's strongest argument and yet did inquire about arguably irrelevant matters"); *Dobrowolsky v. Califano*, 606 F.2d 403, 407-08 (3d

A second group of cases involving the presentation of the legal bases of disability explore whether a particular disability that was presented at the hearing was presented fully and properly. Thus, a common basis for remand exists when a claimant, whose special insured status ended prior to the hearing, presents evidence only on the issue of current disability and the administrative law judge fails to develop evidence that could link the disability to the earlier, relevant period of time.¹⁵⁸ Similarly, courts have remanded cases when administrative law judges fail to obtain, or discourage the presentation of, competent and relevant general proof of disability,¹⁵⁹ or proof specifically required to establish

Cir. 1979) (failure to examine further into claimant's ischemic heart disease, a listed impairment; the court noted that "[a]rguably, the [administrative law judge] should have pursued this possibility by calling for additional evidence, and if counsel had represented [the claimant] this possibility undoubtedly would have been pursued"); *Heinitz v. Califano*, 429 F. Supp. 940, 949 (W.D. Mo. 1977) (failure to explore a number of specific listed impairments and evidence of their cumulative effect on claimant's ability to work). *See also* *Lupinacci v. Mathews*, 433 F. Supp. 47, 49-50 (S.D.N.Y. 1977), in which the court remanded because the administrative law judge failed to explore the ultimate disabling effects of the claimant's serum hepatitis, when the existence of the hepatitis was clearly insufficient to establish disability. In *Figuroa v. Secretary of HEW*, 585 F.2d 551, 553-54 (1st Cir. 1978), the court remanded for further development of a claim based on the side effects of prescribed medication despite a finding that existing evidence on the issue was "not strong," stating that "[i]t would have been appropriate for the administrative law judge to have sought further medical evidence, or to have made some further inquiry, since [the claimant] raised the question." *Id.* at 554.

158. *See, e.g.*, *Thorne v. Califano*, 607 F.2d 218, 219-20 (8th Cir. 1979) (failure to develop evidence relating to period prior to termination of special insured status); *Sellers v. Secretary of HEW*, 458 F.2d 984, 986 (8th Cir. 1972) (the administrative law judge "did not give the claimant an opportunity to describe her condition during the critical period of time. His inquiry of her was limited to her present condition only"); *Saldana v. Weinberger*, 421 F. Supp. 1127, 1131-32 (E.D. Pa. 1976) (failure to make claimant aware of the significance of the dates of special insured status). In *Sellers* the court noted that "[i]t should be a simple process for the claimant, who is now represented by competent counsel, to fully develop medical opinion as to whether or not she was actually disabled during the critical period". 458 F.2d at 986. In *Thorne* the claimant was represented; the court noted, "without intending criticism," that the claimant's counsel should have submitted evidence on this point. 607 F.2d at 219 n.3.

159. Thus, courts have remanded cases in which administrative law judges fail to obtain subjective evidence of pain or blindness. *See, e.g.*, *Valle v. Califano*, [1980 Soc. Sec. Transfer Binder] UNEMPL. INS. REP. (CCH) ¶ 16683 (S.D.N.Y. 1979) (administrative law judge failed to develop full record on effect of pain on claimant); *Skenandore v. Califano*, 473 F. Supp. 1362, 1363 (E.D. Wis. 1979) ("the fact that [the claimant] did not know he could present subjective evidence of his symptoms was crucial in his case"); *Clemmons v. Weinberger*, 416 F. Supp. 623, 626 (W.D. Mo. 1976) (failure to seek subjective evidence of pain when seated); *Dunn v. Richardson*, 325 F. Supp. 337, 345 (W.D. Mo. 1971) (because the administrative law judge considered only objective medical evidence to be relevant, the claimant and her witness were "given no opportunity by the examiner to testify in respect to the nature and severity of her blindness"). In *Clemmons v. Weinberger*, 416 F. Supp. 623, 626 (W.D. Mo. 1976), the administrative law judge was criticized for failing to inquire into the claimant's ability to get to and from a job, a "factor . . . significant

a particular disability.¹⁶⁰

d. Presentation—Questioning of Witnesses

The questioning of witnesses involves an aspect of administrative law judges' presentation role different from that discussed immediately above, as well as an aspect of their development role different from that considered with respect to the compilation of a list of witnesses. The issue is whether a witness, who attended the hearing and testified to one or more presumably relevant matters, was questioned fully and properly. The cases can be divided into two categories: first, those involving the questioning of vocational experts, usually called to establish that some suitable employment is available to the claimant despite a demonstrated inability to engage in any former occupations; and second, those involving the questioning of the claimant.¹⁶¹ Although other witnesses, typically friends and relatives of the claimant, are frequently called to testify to the apparent effects of the claimant's disability, virtually all problems with questioning of witnesses involve vocational experts and claimants, possibly because other witnesses' testimony is relatively simple and direct.¹⁶²

to a determination of her ability to engage in gainful employment on a regular or sustained basis." *See also* *Smith v. Secretary of HEW*, 587 F.2d 857, 861-62 (7th Cir. 1978), in which the court noted that evidence of an earlier finding of disability under state law had not been introduced into the record. Although this determination would not be conclusive relative to a finding of a disability under the Social Security Act, the court added that "even minimal advocacy" would suggest arguing that the two decisions should be consistent. *Id.* at 862.

160. To some extent this is the same failure as noted above with respect to listed impairments. *See* note 157 *supra*. Other examples are cases involving proof of alcoholism as a basis of disability. Case law requires evidence of certain effects on the claimant, and courts have remanded cases when the administrative law judge fails to inquire into those particulars. Thus, in *Veal v. Califano*, 610 F.2d 495, 497 n.6 (8th Cir. 1979), the court concluded that "the ALJ's questioning of [the claimant] regarding his alcohol problem was totally inadequate. He asked only three brief questions concerning [the claimant's] drinking habits. The questions did not relate in any way to his ability to voluntarily control his drinking, and [the claimant's] responses were not developed." *See also* *King v. Califano*, 599 F.2d 597, 599 (4th Cir. 1979); *Clary v. Harris*, [1980 Soc. Sec. Transfer Binder] UNEMPL. INS. REP. (CCH) ¶ 17057 (D.D.C.).

161. The problem of how to question a vocational expert and other witnesses besides the claimant arises, of course, only after the administrative law judge has assessed the need for and has chosen to call the witness. *See* text accompanying notes 149-52 *supra*.

162. Some cases involve generally incomplete questioning that can include other witnesses as well as the claimant. *See, e.g., Rosa v. Weinberger*, 381 F. Supp. 377, 381 (E.D.N.Y. 1974), in which the court found that the administrative law judge's questions to the claimant and her daughter "were cursory and rarely were the necessary follow-up questions asked." *See also Tillman v. Weinberger*, 398 F. Supp. 1124, 1128-29 (N.D. Ind. 1975) (failure to ask follow-up questions of claimant and her two daughters after ineffective questioning by claimant's representative).

The key to the examination of a vocational expert in disability cases is the presentation of complete hypothetical questions that allow the expert to express an opinion as to whether the claimant, given the facts assumed in the hypothetical question, can engage in a particular, available occupation. Additionally, the expert should give examples of the occupations.¹⁶³ Thus, courts have remanded cases when a finding of nondisability was based on the opinion of a vocational expert in response to a hypothetical question by an administrative law judge in which important facts from the record were omitted or the facts included in the question were erroneous or incomplete.¹⁶⁴ A remand is the only option in these cases because the reviewing court does not have the expertise to evaluate the claimant's capacity despite the presence of all relevant evidence.¹⁶⁵ Courts also expect the administrative law judge to cross-examine the vocational expert. Thus, cases have

163. See generally text accompanying notes 39-41 *supra*. The questioning of vocational experts remains important despite the use of the new vocational guidelines. See Gilliam v. Califano, 620 F.2d 691, 694 (8th Cir. 1980). The vocational expert is not to interpret the medical evidence or offer an opinion on the ultimate issue of the claimant's ability to engage in substantial gainful activity. Garcia v. Califano, [1980 Soc. Sec. Transfer Binder] UNEMPL. INS. REP. (CCH) ¶ 17011 (E.D. Pa.).

164. See, e.g., Brenem v. Califano, 621 F.2d 688, 689-90 (5th Cir. 1980) (failure to include evidence of psychological impairments); McGill v. Harris, 615 F.2d 365, 367 (5th Cir. 1980) (failure to include claimant's age, education and work experience); Lewis v. Califano, 574 F.2d 452, 456 (8th Cir. 1978) (question assumed claimant could stop drinking despite evidence of chronic alcoholism); Daniels v. Mathews, 567 F.2d 845, 848 (8th Cir. 1977) (question included vague and incomplete reference to mental condition); Febo Agosto v. Secretary of HEW, 440 F. Supp. 251, 254 (D.P.R. 1977) (failure to include reference to evidence of mental deficiencies); Kelley v. Weinberger, 391 F. Supp. 1337, 1343 (N.D. Ind. 1974) (failure to include subjective evidence of pain and numbness, or claimant's age, education, and employment history). Cf. Fulks v. Califano, [1980 Soc. Sec. Transfer Binder] UNEMPL. INS. REP. (CCH) ¶ 16638 (S.D. Ohio 1979) (court remanded because administrative law judge failed to include subjective evidence of pain in the hypothetical question, without making a specific finding as to why that evidence was not believed). See also Diabo v. Secretary of HEW, 627 F.2d 278, 283 (D.C. Cir. 1980) (claimant's need to nap and difficulties in travelling omitted; evidence of physical impairment and pain described incompletely).

165. Cf. Mickelson v. Califano, [1980 Soc. Sec. Transfer Binder] UNEMPL. INS. REP. ¶ 17015 (D. Minn.) (court awarded benefits after finding that vocational expert had been questioned without regard to all relevant facts because record as a whole "conclusively" established claimant's disability). Compare Stewart v. Cohen, 309 F. Supp. 949, 956-57 (E.D.N.Y. 1970) (court rejected an argument that a remand was not required because the entire record was available to the vocational expert when the administrative law judge asked a hypothetical question that omitted facts favorable to the claimant) with DeSousa v. Califano, [1980 Soc. Sec. Transfer Binder] UNEMPL. INS. REP. (CCH) ¶ 16962 (D.D.C.) (court refused to remand despite use of a hypothetical question that omitted reference to claimant's alleged pain because the vocational expert was found to have heard all of the testimony at the hearing and was subject to cross-examination by the claimant's attorney).

been remanded when no effort was made to seek an explanation of the expert's conclusions, when follow-up questioning was incomplete, and when the administrative law judge did not challenge incorrect assumptions made by the expert.¹⁶⁶

The administrative law judges' responsibility in questioning of claimants is less clear, although courts have remanded when the questioning was unfairly presented or, even if fairly presented, resulted in incomplete testimony.¹⁶⁷ A related factor is the claimant's ability to present his or her own testimony effectively.¹⁶⁸ There does not appear to be any pattern in the cases involving incomplete questioning of claimants. Courts have remanded because of incomplete questioning concerning both medical and vocational issues,¹⁶⁹ including vocational

166. *See, e.g.*, *Johnson v. Harris*, 612 F.2d 993, 997-98 (5th Cir. 1980) (no inquiry into types of jobs claimants could perform with reference to physical and mental impairments); *Dobrowolsky v. Califano*, 606 F.2d 403, 408 (3d Cir. 1979) ("expert was never pressed to explain his conclusions"); *Garcia v. Califano*, [1980 Soc. Sec. Transfer Binder] UNEMPL. INS. REP. (CCH) ¶ 17011 (E.D. Pa.) ("the ALJ had a duty to seek some explanation of the expert's conclusions"); *Herlache v. Califano*, 478 F. Supp. 848, 849 (E.D. Wis. 1979) (report filed with court showed expert's conclusion concerning availability of particular work was incorrect; "had [the claimant] been represented by counsel at his administrative hearing, his case would have been presented more effectively"). *See also* *Concepcion v. Secretary of HEW*, 337 F. Supp. 899, 901 (D.P.R. 1971) (the court criticized the administrative law judge for "leading" the vocational expert away from the conclusion that an employer might not risk hiring someone who had been ill). *Cf.* *Peoples v. Richardson*, 468 F.2d 601, 602 (5th Cir. 1972) ("no impropriety in the hearing examiner inquiring fully into the basis of vocational expert's conclusions relative to employment available to claimant"); *Brittingham v. Weinberger*, 408 F. Supp. 606, 610 (E.D. Pa. 1976) (court, although remanding the case on other grounds, rejected an argument based on the administrative law judge's questioning of the vocational expert because the claimant did not "suggest that she was unable to effectively cross-examine the vocational expert . . . without the assistance of counsel or that the absence of cross-examination was in any way prejudicial").

167. *See, e.g.*, *Quies v. Califano*, 460 F. Supp. 110, 112 (E.D. Wis. 1978) (administrative law judge admitted that "[c]laimant's testimony was elicited with considerable difficulty, and with lack of completeness through an interpreter"); *Diabo v. Secretary of HEW*, 372 F. Supp. 399, 401 (D.P.R. 1973) (administrative law judge "limited [the claimant's] testimony at hearing by telling her to answer exactly what he asked").

168. In *Torres v. Secretary of HEW*, 337 F. Supp. 1329 (D.P.R. 1971), the court was concerned about the claimant's incomplete responses even though he sought deliberately to evade the questions asked of him, finding his "sophomoric attempt to evade" evidence of his inability to present his case properly. *Id.* at 1332. *Cf.* *Pelletier v. Secretary of HEW*, 525 F.2d 158, 161 (1st Cir. 1975) (court ordered a remand because claimant, educated at the Museum School of Fine Arts in Boston, was not questioned fully concerning the conditions at her work as a technical illustrator).

169. *See, e.g.*, *Smith v. Secretary of HEW*, 587 F.2d 857, 861 (7th Cir. 1978) ("[a]nother deficiency is the very limited probing by the ALJ regarding the physical effort actually required by [the claimant] in her laundry work"); *Copley v. Richardson*, 475 F.2d 772, 773-74 (6th Cir. 1973) (incomplete questioning about claimant's ability to work because administrative law judge asked about her hourly wages, but not her weekly, monthly, or yearly earnings); *Hennig v. Gardner*, 276

matters that were presented to an expert as part of a hypothetical question.¹⁷⁰

D. *Satisfying the Minimum Requirements with Representation: An Incomplete and Sometimes Unnecessary Solution*

As has been shown above, courts find that claimants are deprived of their right to a disability determination based on a complete record and a full and fair hearing when administrative law judges fail in some respect to perform their development and presentation functions effectively. How should the minimum requirements of the disability determination process be met? Courts often seem to give up on the administrative law judge and look to the possibility of representation as the solution, at least in those cases in which the claimant's case, as opposed to the government's case, is not developed or presented properly. In some instances, the representative's role is seen as virtually indispensable, whether expressed in general terms or limited to the particular case.¹⁷¹ Although nothing indicates that representatives will be found to be indispensable as a matter of law,¹⁷² the actual value of representation must be considered in formulating any proposal to improve the present non-adversary system.

The true role of representatives in providing claimants a disability determination based on a complete record and a full and fair hearing is particularly apparent when administrative law judges fail in the process. A review of those significant aspects of the process in which the

F. Supp. 622, 625 (N.D. Tex. 1967) (the claimant "should have been questioned more thoroughly by the examiner concerning her arthritic condition").

170. See, e.g., *Cox v. Califano*, 587 F.2d 988, 990-91 (9th Cir. 1978) (failure to ask claimant about his ability to sustain daily work activity when the ability was assumed in question to vocational expert); *Barnett v. Mathews*, 418 F. Supp. 710, 711 (N.D. Tex. 1976) (question to vocational expert assumed that claimant could engage in sedentary work without sufficient evidence in the record to support that assumption); *Torres v. Secretary of HEW*, 337 F. Supp. 1329, 1332 (D.P.R. 1971) ("an attorney would have aided [the claimant] in describing more fully his prior jobs so as to give the expert a more adequate basis on which to make his findings").

171. See, e.g., *Herlache v. Califano*, 478 F. Supp. 848, 849 (E.D. Wis. 1979) ("had [the claimant] been represented by counsel at his administrative hearing, his case would have been presented more effectively"); *Diaz v. Secretary*, 372 F. Supp. 399, 401 (D.P.R. 1973) ("whether the claimant is or is not assisted by counsel at the administrative hearing . . . can mean the difference between remaining uncompensated or receiving the requested benefits"). In *Robinson v. Celebrezze*, 248 F. Supp. 149, 150 (W.D.S.C. 1965), the court noted that given the practices of the administrative law judges in its region, "the unrepresented claimant is beat before he starts." Cf. K. DAVIS, *supra* note 85 (counsel "useless" and a "needless expense").

172. See note 16 *supra*.

administrative law judge cannot, and perhaps should not, assume primary responsibility for the development or presentation of a claimant's or the government's case, shows that some representation may be necessary. Because of the remedial and beneficial purposes of the Social Security program, which themselves substantiate the value of the non-adversary nature of the existing disability determination process, a sharing of responsibility among the administrative law judge and the parties, or, if necessary, the parties' representatives, is the appropriate and most effective solution to the problem of unrepresented claimants. A conscious sharing of responsibilities is appropriate because the parties ultimately share the goal of a properly and efficiently administered program.¹⁷³ The assumption of some responsibility for the full and fair administration of the program by some type of representative is necessary and should be welcomed by the corps of administrative law judges that has been unable to assure the minimum requirements of the disability determination process on its own.

It is not always clear whether and to what extent a representative or the administrative law judge should be responsible for developing or presenting a particular case.¹⁷⁴ After reviewing the circumstances in which courts find that administrative law judges have not met their responsibilities, some situations can be seen as involving essentially neutral functions when the approach to the tasks involved would not be affected because one was representing the claimant or the government. Others, however, involve more of an advocacy function, although in a non-adversary context, when the approach would be colored depending on the side that one was representing. Although representatives certainly can perform neutral functions, there is no reason to relieve prehearing administrators, or, if necessary, administrative law judges

173. This correspondence of interests distinguishes Social Security disability adjudications from others because "there are no necessary winners or losers fighting over a fixed sum set aside for disability purposes." See Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 754-55 (1976). Conflict between the class of potential beneficiaries and the trust fund itself is not involved here. See text accompanying note 17 *supra*. If improved procedures result in more awards of benefits than the program can support, the appropriate congressional response would be to amend the substantive disability requirement. See text accompanying notes 26-28 *supra*. See generally Bloch, *Cooperative Federalism and the Role of Litigation in the Development of Federal AFDC Eligibility Policy*, 1979 WIS. L. REV. 1, 27-51.

174. For example, in *Cox v. Califano*, 587 F.2d 988, 991 (9th Cir. 1978), the court found that the administrative law judge did not inquire into certain relevant facts and concluded, without speculating how it might best be done, that "[h]ad a more thorough inquiry been undertaken, much time and effort might have been avoided."

and their staffs, from these responsibilities. On the other hand, the use of representatives may, to the extent that there is an advocacy function involved, be necessary and desirable.

The clearest example of an essentially neutral function is the development of documentary evidence. Although courts recognize that representatives can be useful in compiling a complete record,¹⁷⁵ the administrative law judge's responsibility in this regard is equally important.¹⁷⁶ The development function includes asking the claimant to provide a list of relevant sources, and examining records and reports for indications that further records and reports are available. Although the search for sources may be active, it remains neutral in character. The development function in the calling of witnesses can be seen similarly: sources must be questioned and examined for potential witnesses, but the task of calling them is essentially neutral. By contrast, the presentation of claimants' legal bases of disability is a fairly obvious advocacy function, and an area in which representation is especially helpful.

The remaining aspect of the presentation of the claim, the questioning of witnesses, and certain elements of development relative to documentary evidence and witnesses, are not so easily categorized as either neutral or advocacy functions. Although certain basic questions can be asked routinely, the medical or vocational facts are often so complex, conflicting, or obscure that the questioning of witnesses must be conducted from the separate perspectives of the parties.¹⁷⁷ Similarly, al-

175. *See, e.g.*, *Cullison v. Califano*, 613 F.2d 55, 58 (4th Cir. 1980) ("The difference in the evidence presented by claimant and that discovered by counsel is striking."); *Storck v. Weinberger*, 402 F. Supp. 603, 608 (D. Md. 1975) (problems raised concerning incomplete record will be "obviated" on remand when claimant represented). Popkin found that adding additional documentary evidence is a key to claimants' success at disability hearings, whether such evidence is provided by the claimants themselves or their representatives. *See Popkin, supra* note 1, at 1030-32.

176. *See* text accompanying notes 130-47 *supra*. In both *Garrett v. Richardson*, 363 F. Supp. 83, 90 (D.S.C. 1973) and *Byrd v. Richardson*, 362 F. Supp. 957, 963 (D.S.C. 1973), the court noted that the administrative law judge had responsibility for developing the documentary evidence, despite the representation of claimants.

177. *See, e.g.*, *Dobrowolsky v. Califano*, 606 F.2d 403, 407-08 (3d Cir. 1979) (additional evidence concerning a listed impairment "undoubtedly would have been pursued" by counsel); *Torres v. Secretary of HEW*, 337 F. Supp. 1329, 1332 (D.P.R. 1971) ("an attorney would inquire further into the neuropsychological aspects of the case"). In *Torres* the court expressed the role of an attorney relative to the questioning of a vocational expert as follows:

With the aid of an attorney [the claimant] would have been able to interrogate the vocational expert adequately; the examiner would not have been able to ask an inadequate, confusing and incomplete hypothetical question (or at least the defects would

though certain documents can be compiled and certain witnesses called almost automatically, other development functions involve an element of advocacy when the need for the evidence becomes apparent only after presentation of more difficult and subtle issues.

The distinction between neutral and advocacy functions indicates when it may be more appropriate to rely on representatives or administrative law judges to assure the minimum requirements that a disability decision be based on a complete record and a full and fair hearing. An analysis of the important development and presentation aspects of the hearing process is presented in the next section in a proposed system of shared responsibilities among claimants, representatives, and administrative law judges. First, however, other suggestions for change in the non-adversary disability determination process, including the use of a government representative, are considered.

II. REPRESENTATION AND ADVOCACY IN NON-ADVERSARY HEARINGS

Administrative law judges do not perform effectively the three jobs that their three hats symbolically represent. The cases discussed in the previous section show that administrative law judges often fail to perform adequately throughout the hearing process in the development and presentation of the claimant's and the government's case. Furthermore these failures, at least when claimants are unrepresented, are seen as a denial of the claimant's right to a disability determination based on a complete record and a full and fair hearing, and the cases are remanded for further proceedings. Thus, in effect they are remanded for another try by the administrative law judge to wear whichever of the three hats was not worn with distinction at the original hearing.¹⁷⁸

The problem is that at least certain responsibilities left to administrative law judges cannot and should not be performed by them. Although there are supporters of the present structure, most support the

have been corrected). . . . An attorney would have aided [the claimant] in describing more fully his prior jobs so as to give the expert a more adequate basis on which to make his findings.

337 F. Supp. at 1332.

178. One has no more of a right to representation on remand than existed at the original hearing. *See generally* text accompanying note 16 *supra*. There are cases, of course, in which the attorney handling the appeal in the federal court will represent the claimant at the hearing on remand, and courts have expressed hope or simply assumed that this will happen. *See, e.g.,* *Storck v. Weinberger*, 402 F. Supp. 603, 608 (D. Md. 1975).

system because other options, including a fully adversary system, are thought to offer little or no improvement.¹⁷⁹ There is no affirmative support for the present structure as a particularly suitable system, at least to the extent that the system is taken as it operates in practice.¹⁸⁰ Indeed, studies of the current system indicate that administrative law judges spend relatively little time on case development and generally fail to make the most of their abilities or the procedures available to them.¹⁸¹

There are, however, possibilities for change within the existing non-adversary structure of the disability determination process that can not only improve the quality of the process, but also can eliminate virtually all of the present deficiencies at least with respect to the hearing stage of the process. The proposal presented below is based on distinctions drawn in the preceding section between neutral and advocacy functions, and the development and presentation aspects of the hearing process. The proposal draws from some recent suggestions for change in the disability determination process and the recent proposed experiment with the use of government representatives, both of which are discussed briefly first.

179. See SOCIAL SECURITY HEARING SYSTEM, *supra* note 9, at 46-51 (possibility of representation for claimants or government does not provide sufficient improvements to justify change from existing process). See also Mashaw, *supra* note 13, at 788, in which Professor Mashaw notes that the concern expressed by the Supreme Court in *Perales v. Richardson*, 402 U.S. 389, 410 (1971), with "bringing down" the existing structure is understandable because "[t]he only logical replacement for one man wearing three hats is three men, each wearing one . . ." The cost of such a change, he concludes, would "render it unacceptable." *Id.* at 789.

180. Judge Friendly advocates extension of the non-adversary model, but expects that "the 'judge' would assume a much more active role with respect to the course of the hearing; for example, he would examine the parties, might call his own experts if needed, request that certain types of evidence be presented, and, if necessary, aid the parties in acquiring that evidence." Friendly, *supra* note 15, at 1289. See also B. SCHWARTZ, *supra* note 12, at 254 (supports broader use of "inquisitorial" procedure used in Social Security hearings, which includes "active development of the case on both sides by an independent judge"). Professor Schwartz relies in part on his knowledge of the French inquisitorial system, which includes a very active development role for the decisionmaker. See generally B. SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD* (1954). See also Skoler, *International Adjudication Perspectives: A Comparison of U.S. Social Security Appeals Procedures With Those of Three Other Nations*, 4 OHA L. REP. 43 (No. 3, 1980).

181. See SURVEY AND ISSUE PAPER, *supra* note 3, at 34 (less than 10% spend more than 50% of their time and more than 50% spend less than 25% of their time on case development; 47% of the judges indicated that their staff spends 50% or more of their time on development); J. MASHAW, *et al.*, *supra* note 3, at 73 ("ALJs do not question claimants very closely in the general run of cases"); *id.* at 82-87 (vocational experts poorly questioned); *id.* at 62-63 (ALJs make little use of prehearing conferences to limit and frame issues for hearing).

A. *Some Recent Suggestions For Change*

Most suggestions for change in the Social Security disability determination process have amounted to specific, limited recommendations designed to improve the present non-adversary system.¹⁸² The recommendations are limited because no clear consensus has emerged to identify what is wrong with the present system,¹⁸³ thereby making it difficult to justify broad proposals for change. Also, there are enough particulars in the process that can and should be changed to occupy those interested in reform.¹⁸⁴

The most recent comprehensive series of proposals for change developed from a study by The National Center for Administrative Justice funded by the Social Security Administration and published in 1978.¹⁸⁵ Despite concern with an "enormous variance in developing effort" among administrative law judges, the study declined to propose the use of independent staff to investigate and present claims. The study concluded that the investigatory responsibility for judges should be retained "with an active role in developing and presenting evidence," because "the better decision about whether to gather evidence will be made by the one who ultimately must decide the case."¹⁸⁶ The study also advocated greater use of prehearing conferences "to provide a more focused statement of the issues and the gaps in the evidentiary record,"¹⁸⁷ and further study into the possible use of some type of prehearing investigation of the facts by department officials to develop in-

182. Proposals to substitute a fully adversary system are relatively unimportant. *See generally* text accompanying notes 14-15 *supra*. This does not mean, however, that administrative law judges would not like to see such a change. *See* SURVEY AND ISSUE PAPER, *supra* note 3, at 57 ("large number" would prefer adversary proceedings).

183. Administrative law judges have no clear sense of the deficiencies in the disability determination process, although most feel that some changes in administration of the process would be helpful. *Id.* at 57-58.

184. Professor Davis forecast such a role for legal services lawyers when he noted in 1965 that "the choice will often be between employing government-paid lawyers to represent the poor and discovering or inventing ways to induce the government officers with whom such lawyers would deal to bring more diligence to the protection of the interests of the poor." K. DAVIS, *supra* note 85, at § 8.10.

185. J. MASHAW, *et al.*, *supra* note 3. *See also* SOCIAL SECURITY HEARING SYSTEM, *supra* note 9.

186. J. MASHAW, *et al.*, *supra* note 3, at 53.

187. *Id.* at 64. The study also suggests a greater use of prehearing conferences to explore the possibility of a summary reversal, which "might provide a critical safety valve in the current era of increasing numbers of appeals." *Id.*

formation that might support or refute the claimant's case.¹⁸⁸ The study also proposed a greater use of written interrogatories concerning expert medical opinion, whether from neutral medical advisors or from the claimant's treating physician,¹⁸⁹ and the exchange of responses between treating physicians and consultants when the responses appear to conflict.¹⁹⁰ Finally, although some suggestions were made to improve the quality of representation when claimants are represented, the question of whether publicly funded representation should be provided was deferred.¹⁹¹

The use of a personal interview before the hearing has been suggested by others as a means to develop a better record for the hearing, or to avoid the need for a hearing altogether.¹⁹² A related suggestion is to rely entirely on a face-to-face reconsideration attended by a decisionmaker, a less formal version of the present hearing, or to combine the reconsideration and hearing stages into a new, more active inquisi-

188. *Id.* at 62-63. The investigation would include interviewing witnesses, including physicians, and might involve surveillance of the claimant to verify testimony concerning daily activities. *Id.* at 61. The authors note that the use of such evidence at a hearing may create a greater need for claimants to be represented. *Id.* at 62.

189. *Id.* at 57, 87-89.

190. *Id.* at 57-59. The authors also suggested that claimants be given a consulting physician's report prior to the hearing to give them an opportunity to prepare an explanation or rebuttal. *Id.* at 59.

191. *Id.* at 96-97. Suggested improvements included monitoring fees, providing full advice to claimants concerning representation, and training and certifying attorneys and lay representatives. *Id.* at 97. The authors note that posthearing development of evidence should be avoided, and that even with an opportunity to respond this is an area in which claimants are "particularly ill-suited" to represent themselves. *Id.* at 89.

192. *See, e.g.,* STAFF REPORT, *supra* note 9, at 33-34; STAFF OF SUBCOMM. ON SOCIAL SECURITY, HOUSE COMM. ON WAYS AND MEANS, 94TH CONG., 1ST SESS., BACKGROUND MATERIALS ON SOCIAL SECURITY HEARINGS AND APPEALS 10-11 (Comm. Print 1975). Members of the Carter administration expressed an interest recently in providing face-to-face meetings with claimants at the reconsideration stage prior to hearing. *See* 1979 House Hearings, *supra* note 9, at 61 (testimony of Secretary of HEW); *Social Security Act Disability Program Amendments: Hearings on H.R. 3236 and H.R. 3464 before the Senate Comm. on Finance, 96th Cong., 1st Sess. 68 (1979)* [hereinafter cited as 1979 Senate Hearing]. A group of legal services lawyers testified in support of the proposal, and recommended that claimants should be represented at the reconsideration conference. *See* 1979 House Hearings, *supra* note 9, at 118-19 ("Claims and evidence will be more fully developed earlier, and claimants and decision-makers can discuss new evidence and resolve confusing and ambiguous aspects of the claim"). *Cf. id.* at 182-83 (statement of Council of State Administrators of Vocational Rehabilitation questioning whether early face-to-face conferences would improve the determination process). *See also id.* at 246 (testimony of Commissioner of Social Security: "Let's get a lot of these cases better decided administratively and out of the hearing process").

torial proceeding,¹⁹³ which may be nothing more than a description of how the present non-adversary system should operate.¹⁹⁴ As was the case with the study by The National Center for Administrative Justice, an acceptance of the basic non-adversary structure by most commentators has led to extreme caution in recommending significant changes concerning representation at disability hearings.¹⁹⁵

2. *Government Representative Experiment*

The most important recent consideration of the question of representation at non-adversary hearings, although short-lived, was the Social Security Administration's proposed experiment with the use of government representatives at Social Security disability hearings. The experiment, which was proposed in January, 1980, and withdrawn before going into effect in July, 1980,¹⁹⁶ would have added a government representative to the process to prepare the case for hearing and, if the claimant was represented, to represent the government at the hearing.¹⁹⁷ An experiment using "presenters" also was considered but never proposed, in which the presenter would have prepared and presented the case in a neutral and non-adversary capacity whether or not the claimant was represented.¹⁹⁸

Under the proposed experiment, the preparation function of the representative included examination of the evidentiary record for completeness and obtaining additional necessary evidence, apparently

193. See Dixon, *supra* note 10, at 738.

194. See note 180 *supra*.

195. Even Professor Popkin does not advocate representation after concluding that represented claimants are more successful; instead, he lists policy considerations relevant to deciding whether representation should be provided that balance some advantages against returns and costs in the non-adversary setting. Popkin, *supra* note 1, at 1035. On the other hand, to the extent that models may be considered that would rely on truly independent, non-active administrative law judges, the view concerning representation can be expected to change. See, e.g., R. DIXON, *supra* note 3, at 147. See also B. SCHWARTZ, *supra* note 12, at 254 (non-adversary system may be more "fair" to unrepresented claimants than adversary procedure); Kaufman, *supra* note 83, at 116 (suggests use of "para-counsel").

196. 45 Fed. Reg. 2345, 47162 (1980). The experiment was to involve a randomly selected number of disability cases at four hearing offices across the country. *Id.* at 2345.

197. *Id.* at 2345-46. Parallel regulations were proposed for OASDI and SSI appeals. Page citations that follow are only to the OASDI regulations.

198. Letter from Director of Office of Policy and Procedures, Social Security Administration to Frank S. Bloch (July 30, 1980). The presenter's prehearing responsibilities would have been the same whether the claimant was represented or not; at the hearing, the presenter would have supplemented the representative's questions unless the representative agreed to allow the presenter to conduct the initial questioning. *Id.*

whether such evidence would support the claimant's or the government's case.¹⁹⁹ The proposal intended to insure that evidence was current and that "any material conflicts, inconsistencies, ambiguities, or unclearness in the evidence have been resolved."²⁰⁰ Furthermore, the representative would either recommend a favorable decision to the administrative law judge if the claimant was entitled to benefits, or recommend, in appropriate cases, that the appeal be dismissed.²⁰¹ The representative would have prepared the case for hearing, however, only until it was determined that the claimant would not be represented by an attorney. The representative was to transfer the claim to the hearing office "promptly" on determining that the claimant would be represented, and then would "have no further involvement in the case."²⁰²

In those cases in which the claimant was represented by an attorney, the government representative would have presented the government's case at the hearing. The representative would have been expected to confer with the claimant's attorney on evidentiary and legal matters before the hearing and submit, if possible, stipulated facts or issues to the administrative law judge for approval; meet the government witnesses, request subpoenas and, when necessary, submit additional issues for consideration at the hearing; present an opening statement at the hearing, offer exhibits and object, when appropriate, to the claimant's exhibits; and present a closing argument and prepare proposed findings of fact and conclusions of law.²⁰³ Even though the representa-

199. The proposed regulations were not explicit on this point, but indicated that the representative was to "determin[e] the need for additional evidence" and obtain such evidence when "necessary," without limiting this function to supporting the government's case. 45 Fed. Reg. 2347 (1980). This appears to have been the intention of the Social Security Administration, as shown in draft procedures prepared for the experiment. See Office of Operational Policy and Procedures, Social Security Administration, U.S. Department of Health, Education and Welfare, *Draft Claims Manual Procedures for Government Representative Experiment 8* (October 5, 1979) [hereinafter cited as *Draft Procedures*] ("The [government representative] should insure that all sources of pertinent evidence have been contacted and the evidence obtained, that complete information has been obtained . . . concerning the claimant's condition and its effect on his/her ability to engage in substantial gainful activity").

200. See *Draft Procedures, supra* note 199, at 9.

201. 45 Fed. Reg. at 2347. A dismissal recommendation could be based on the grounds of res judicata or a failure to file a timely appeal. *Id.*

202. *Id.* Apparently the determination could have been made at any time during preparation of the case. At one point the intention was to determine whether a claimant was represented only after preparation of the case had been completed. *Draft Procedures, supra* note 199, at 22.

203. 45 Fed. Reg. at 2347. Again, the role of the representative relative to presenting evidence or arguments favorable to the claimant was unclear in the proposed regulations. Cf. *Draft Procedures, supra* note 199, at 25 (procedures would have stated explicitly that representative would

tive would have performed many functions otherwise left to the administrative law judge, the judge would have retained ultimate responsibility for the full and complete development and presentation of the case.²⁰⁴

The experiment was proposed as one of a number of changes in the disability determination process designed "to provide better decisions earlier in the process, to sharpen the issues presented to the Administrative Law Judge and to streamline the process."²⁰⁵ More specifically, the introduction of a government representative was designed to improve the quality of hearing decisions, enhance the uniformity and consistency of decisions, accelerate the process, increase administrative law judge productivity, and reduce hearing costs.²⁰⁶ Central to all of these purposes was the idea that by developing the record and presenting the case when the claimant was represented, a government representative would free the administrative law judge from time consuming and diverting responsibilities relative to the development and presentation of the case in order to serve in a more traditional judicial role.²⁰⁷

The proposed experiment was withdrawn following generally negative comments in favor of considering broader reforms that would in-

retain "the traditional responsibility [of a Social Security Administration] employee to ensure that the claimant's interests are represented, and that any facts favorable to the claimant are brought out at the hearing").

204. 45 Fed. Reg. at 2347.

205. *Id.* at 2345. One change in the prehearing process is included in the 1980 amendments: notices of disability decisions must now "contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based." 1980 Amendments, *supra* note 2, § 305, at 457. Such detailed and individualized notices of decision are expected to improve disability decisions by requiring a formulation of reasons, and to make it less likely that claimants will appeal decisions because they will understand why their claim was denied. *See* 1979 House Report, *supra* note 107, at 12; 1979 Senate Report, *supra* note 107, at 56-57. *See also* J. MASHAW, *et al.*, *supra* note 3, at 60-61. Another suggestion, not implemented in the 1980 amendments, was to improve the initial determination process by including a face-to-face conference with a decisionmaker. *See* note 192 *supra*.

206. 45 Fed. Reg. at 2347.

207. *See* 1979 House Hearings, *supra* note 9, at 238 (testimony of Commissioner of Social Security that the use of a government representative, and improved initial determination procedures, would "insure a better developed case and permit the administrative law judge to serve in a more purely judicial role"); *id.* at 50 (Statement of Secretary of HEW that the use of government representatives "will help protect the Government's interests and permit the ALJ to serve in a more purely judicial role"); Memorandum from Commissioner of Social Security to Secretary of HEW 4 (November 23, 1979) (government representative will allow the administrative law judge "to give more time and attention to the primary tasks of conducting the hearing and issuing a proper decision").

clude initial determinations and reconsiderations.²⁰⁸ A wide range of objections were raised, among them concern that the government representative would disadvantage represented and unrepresented claimants, that the advantages of a non-adversary setting would be lost, and that the process would become less efficient and more costly.²⁰⁹ Many legal services programs filed objections to the proposed experiment emphasizing their concern that the use of a government representative would introduce an adversary relationship between claimants and the government. They feared that an adversary relationship would result in an anti-claimant attitude on the part of the representatives and therefore records would be developed to favor the government's, rather than the claimant's, position.²¹⁰

C. *Non-Adversary Representatives: A New Approach to the Problems of Non-Representation*

The Social Security Administration's decision to reconsider the gov-

208. 45 Fed. Reg. at 47162. The administration indicated that among the changes it would consider would be "a personal conference before the hearing stage, as well as more complete documentation of claims and more accurate and well-reasoned decisions earlier in the process." *Id.*

209. Among the comments submitted to the Social Security Administration in response to the publication of the proposed experiment were: Letters from the National Employment Director, Disabled American Veterans to Commissioner of Social Security (February 6, 1980) (would negate fair and impartial hearing process, discriminate against claimants with attorneys, burden administrative process, and increase costs); Administrative Law Center of the Legal Aid Bureau, Inc., Baltimore, Maryland to Commissioner of Social Security (February 28, 1980) (adversary hearing would create unfairness in process to disadvantage of claimants, reforms at initial determination and reconsideration stages would be more efficient and less costly); Lawndale Legal Services, Legal Assistance Foundation of Chicago to Commissioner of Social Security (March 5, 1980) (government representative would delay and complicate the process, procedural tools available to government representative would be used to disadvantage of claimants); National Senior Citizens Law Center to Commissioner of Social Security (March 10, 1980) (government representative would control development of record to disadvantage of claimants and restrict access to record by claimants and administrative law judges, poor development can be corrected more easily and at less cost earlier in the process).

210. *See, e.g.*, Letter from Legal Assistance Foundation of Chicago, *supra* note 209, at 9 (claimants would have to "deal with a panoply of adversarial technicalities not only in the presentation of evidence but even, potentially, in its collection and utilization"); Letter from National Senior Citizens Law Center, *supra* note 209, at 4 ("The representative will be adversarial not just at the hearing but in deciding what evidence to seek"; "even if [evidence favorable to the claimant is] sought, given the adversarial nature, it is possible that such evidence will be hidden or discarded rather than presented at the hearing"). The Administration did not expect the experiment to be perceived as so "anti-claimant." *See* Memorandum from Commissioner of Social Security to Secretary of HEW 2 (April 14, 1980).

ernment representative experiment in light of possible improvements in the earlier stages of the disability determination process is sound, at least to the extent that government representatives would have been used to compile the basic evidentiary record for the appeal. There is no reason why clearly underdeveloped records cannot be identified and supplemented by existing personnel to include complete and legible medical reports from the claimant's treating physicians and hospital records which cover all recent or otherwise relevant hospital visits. Indeed, without some significant improvements in the early stages of the process the use of representatives on behalf of claimants or the government would possibly serve as a disincentive to full, prehearing development of the record.²¹¹ An improvement as slight as this would eliminate one of the development responsibilities left to administrative law judges but not always met: The compilation of essentially neutral documentary evidence. Thus, cases would not have to be remanded because records were illegible, or because reports from treating physicians or reports of hospital visits were missing.²¹² Administrative law judges should be relieved of the "non-judicial" development function and representatives need not be provided to perform neutral tasks.

Furthermore, if the administration proceeds with the suggestion that a face-to-face conference should be included at the initial determination or reconsideration stage, certain basic testimony from claimants and other witnesses could be presented at that time. Under the present system such basic testimony should be, although often it is not, elicited from claimants by the administrative law judge. In addition, a complete list of known and available witnesses could be developed for use at a subsequent hearing. Thus, more effective use of prehearing proce-

211. One of the criticisms of the present system is the minimal incentive for full development of the record at early stages in the process because additional evidence can be compiled once a hearing is requested. See *DISABILITY ADJUDICATION STRUCTURE*, *supra* note 2, at 2. See also note 69 and text accompanying notes 104-10 *supra*. On the other hand, the Commissioner of Social Security expressed the view recently that the use of government representatives would encourage better decisions at earlier stages in the process because the people making the decision would know that their decision would be defended at a subsequent hearing. 1979 Senate Report, *supra* note 107, at 68.

212. See cases discussed at text accompanying notes 136-43 *supra*. The uselessness of some remands in these circumstances is illustrated in *Machen v. Gardner*, 319 F. Supp. 1243, 1245 (E.D. Tenn. 1968), in which the court remanded because medical reports were illegible. The following year the same court affirmed the denial of the same claimant's benefits, noting that the "infirmary in the record has been corrected" by oral testimony of the doctor. *Machen v. Finch*, 319 F. Supp. 1245, 1246 (E.D. Tenn. 1969).

dures would avoid the need for administrative law judges to perform their other major development function, the compilation of a list of witnesses, and certain of their presentation functions relative to the questioning of claimants and other witnesses. Additionally, many court-ordered remands based on failures to corroborate other evidence or testimony in the record or to meet responsibilities such as calling key witnesses, questioning claimants fully concerning known disabilities and previous work experience, and questioning other witnesses on similar matters could be avoided.²¹³ Again, these essentially neutral presentation tasks can be performed without the assistance of representatives.²¹⁴

The decision not to experiment with the use of representatives should not be permanent, however, whether or not the prehearing stages of the process are reformed. The introduction of a representative into the hearing process similar to the proposed government representative model, or perhaps more like the neutral and non-adversary "presenters" excluded from the experiment, will be necessary to achieve the goal of providing disability decisions based on complete records and following full and fair hearings. The problem with the proposed government representative model is that the approach was to move toward adversary representation.²¹⁵ The presence of an adversary element in the model, however, detracted unnecessarily from the positive aspects of the present non-adversary system.²¹⁶ The use of a single non-adversary representative at the hearing stage would assure that disability decisions are based on complete records and follow full and fair hearings. This result can be facilitated by having the representative perform those advocacy functions that administrative law judges have not performed, and really should not perform, without destroying

213. See cases discussed at text accompanying notes 149-50, 163-70 *supra*.

214. *But see* 1979 House Hearings, *supra* note 9, at 248-49, in which the Commissioner of Social Security indicated that the administration might want to provide representation for claimants at a face-to-face reconsideration conference.

215. See 1979 House Hearings, *supra* note 9, at 50. (Secretary of HEW characterizing experiment as a "move to a more traditional adversary system"). Many legal services programs took this view of the experiment. See text accompanying note 210 *supra*.

216. The degree to which the government representative was intended to advocate the government's position is unclear. See text accompanying notes 199-204 *supra*. Also, the more adversary the government representative becomes, the greater the need for claimant representation. See 1979 House Hearings, *supra* 9, at 259 (testimony of President, Association of Administrative Law Judges, supporting use of government representatives, but noting that it "creates the countervailing necessity of claimant representation").

the non-adversary structure of the process dictated by the nature and purposes of the Social Security Act. The change would be fully consistent with other improvements in the earlier stages of the disability determination process. Moreover, without other improvements, the prehearing records will remain so incomplete that even essentially neutral developments tasks must be performed by someone at the hearing stage. If necessary, non-adversary representatives could assume these responsibilities that have not been fulfilled satisfactorily by the administrative law judges. Even if prehearing administrators developed a basic record and list of witnesses, representatives in many cases would have to supplement the record to support all theories and issues that should be presented.²¹⁷

Without attempting to present a detailed profile of non-adversary representatives, certain essential attributes can be identified. First, they would be professional representatives, not necessarily lawyers,²¹⁸ trained to develop and present all evidence necessary to establish the ultimate issue of whether the claimant is capable of engaging in substantial gainful activity. Second, they would be independent from the Office of Hearings and Appeals and even from the Social Security Administration, hired perhaps through a new office of the Department of Health and Human Services. Thus the representatives would not be unlike the "independent corps of developers-presenters" rejected by the study by The National Center for Administrative Justice.²¹⁹ The authors of the study concluded that a change to independent developers-presenters would offer "no obvious accuracy advantages over the pres-

217. Thus, the study by The National Center for Administrative Justice concludes that "[i]f there is a respect in which a more adversary perspective may be required, it is in the prehearing development of the facts, not the questioning of witnesses at the hearing." J. MASHAW, *et al.*, *supra* note 3, at 98. In any event, there is no reason to require administrative law judges to compile such documents. To a limited extent, staff assistants are supposed to do this work, but in fact are often not available or not used for these purposes. See STAFF REPORT, *supra* note 9, at 43-44; SURVEY AND ISSUE PAPER, *supra* note 3, at 34-36.

218. Although Professor Popkin finds that attorney representatives are more likely to present new evidence than nonattorney representatives, Popkin, *supra* note 1, at 1030, it is far from clear that formal legal training is necessary to be an effective representative at a disability hearing. See, e.g., *Webb v. Finch*, 431 F.2d 1179, 1180 (6th Cir. 1970) (McCree, J., dissenting); J. MASHAW, *et al.*, *supra* note 3, at 96. See also *Vitek v. Jones*, 445 U.S. 480, 500 (1980) (Powell, J., concurring) (need "competent and independent" assistance at commitment hearings from prison to mental health facility, but not necessarily licensed attorneys). The government representative experiment would have used both attorneys and nonattorneys. 45 Fed. Reg. 2345 (1980).

219. See SOCIAL SECURITY HEARING SYSTEM, *supra* note 9, at 48; J. MASHAW, *et al.*, *supra* note 3, at 53.

ent system,²²⁰ and might possibly be counterproductive because administrative law judges, given their expertise and the fact that they will decide the case, may be in the best position to determine what evidence should be presented.²²¹ The remand cases show, however, that administrative law judges often are unable or unwilling to assume the role necessary to justify this confidence in the present system.²²² When the judges' failure to develop a record or present a case adequately stems from an inability or unwillingness to perform tasks with an advocacy dimension, the need for independent developers-presenters or non-adversary representatives at the hearing stage becomes apparent.²²³

The third attribute of non-adversary representatives is that they would be active developers and presenters of the case from a non-adversary perspective. Social Security disability hearings involve more than the evaluation of objective and easily obtained medical reports and records, despite the Supreme Court's view that disability decisions are based primarily on "routine, standard and unbiased medical reports by physician specialists."²²⁴ Moreover, because the hearing is the only time when claimants and their witnesses meet face-to-face with a decisionmaker, fully presented oral testimony is extremely important.²²⁵ It is with regard to these development and presentation functions, that is, those that involve more than the development of known doctors reports and hospital records and the presentation of routine questions of claimants and obvious witnesses, that some form of advocacy is needed to assure the development of a complete record and a

220. See SOCIAL SECURITY HEARING SYSTEM, *supra* note 9, at 48.

221. J. MASHAW, *et al.*, *supra* note 3, at 53.

222. See text accompanying notes 130-70, *supra*.

223. The authors of the study recognize that "critical, circumstantial evidence . . . is routinely absent in disability cases," J. MASHAW, *et al.*, *supra* note 3, at 53, but suggest that more active prehearing investigation could alleviate this problem. See text accompanying notes 186-90 *supra*.

224. *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) (quoting *Richardson v. Perales*, 402 U.S. 389, 404 (1971)). The difficulties administrative law judges have in assuring full and fair hearing belies this contention. See also Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 41-42 (1976).

225. An administrative law judge with the Social Security Administration wrote, "[o]ral examination is the core of the hearing process. Without it, there would be little reason to hold a hearing. Oral testimony is a more satisfactory and preferable means of obtaining specific data than written statement." Hayes, *Social Security Disability and the Administrative Law Judge*, 17 A.F.L. REV. 73, 77 (1975). See also SURVEY AND ISSUE PAPER, *supra* note 3, at 46 (92% of administrative law judges responding to survey agreed that "the ability to assess the claimant's allegation of pain and general credibility on a face-to-face basis [is] very important").

full presentation of the claim.²²⁶ And yet, given the beneficent and remedial purposes of the Social Security Act, the advocacy need not be adversarial in a traditional sense. Although the representative must be willing and able to seek out evidence and argue positions that would be expected of advocates for claimants or the government, a non-adversary representative would perform with the specific goal of presenting all relevant evidence and arguments to assist the administrative law judge in reaching the correct decision as to whether the claimant is eligible for disability benefits.

The basic responsibilities of non-adversary representatives would be something like the following: obtain detailed personal letters from treating physicians covering all relevant information concerning known disabilities; explore other possible bases of disability by talking with the claimant and examining the existing record, and obtain necessary medical evidence to support or refute the claim; interview and call all relevant witnesses suggested by the record and an interview with the claimant, including, when necessary, medical and vocational experts; question the claimant and all witnesses fully concerning all possible bases of disability and on all other relevant matters, whether or not the resulting testimony is favorable to the claimant's case; present all potentially relevant hypothetical questions to the vocational expert, if any, and question the expert as to the basis of any opinions offered; and assure, in general, that all relevant evidence and arguments have been presented to the administrative law judge. Consequently, claims would be developed and presented fully and few if any cases would be remanded because of an incomplete record or the lack of a full and fair hearing.²²⁷ Moreover, a non-adversary representative could perform these advocacy tasks, given the underlying non-adversary nature of the

226. In disagreeing with the Supreme Court's characterization of Social Security disability hearings, *see* text accompanying note 224, *supra*, Professor Mashaw observes that, "a procedure that begins with routine medical reports concerning clinical diagnosis and treatment becomes a highly judgmental process," requiring the determination of physical abnormalities, resulting functional limitations, the degree to which any physical and functional limitations affect normal capacities, and the interaction of any such limitation with the claimant's ability to work at a job in the national economy, among other matters. Mashaw, *supra* note 223, at 41-42.

227. Although most of the remand cases involve circumstances which indicate that the representatives would be concentrating on the claimant's case, in many instances the representatives also would be developing or presenting the government's case. The government's case is involved, for example, in most remands required by poor questioning of vocational experts. *See also* Foster v. Mathews, 423 F. Supp. 117, 121 (W.D.N.C. 1976) (remand when Secretary failed to offer evidence rebutting presumption of eligibility established by earlier determination of disability).

overall process, as well as, if not better than, claimant and government representatives.²²⁸

In some other respects the representatives' role would be more difficult. Although disability cases cannot be settled in the usual sense, a representative may be able to present information to one side or the other which would show that the appeal was not necessary. It would be inappropriate, however, for the representative to attempt to resolve the dispute independently and actually recommend reversal or dismissal.²²⁹ Similarly, representatives should refrain from presenting a closing argument and instead should present a comprehensive statement of the issues and possible resolutions of the areas of conflict.²³⁰ After the hearing is completed, the representative could evaluate the record and recommend whether the losing party should appeal.

Non-adversary representatives would do more than relieve administrative law judges of time consuming and diverting responsibilities. Separating the judges from the actual development of the record and presentation of the cases would put them in what the proponents of the government representative experiment called the "traditional judicial role,"²³¹ thereby assuring greater impartiality and higher quality decisions.²³² The more active or adversary the administrative law judge

228. Thus, Judge Frankel questions the traditional adversary system in terms of development of evidence. See Frankel, *supra* note 73, at 1038 ("we leave most of the investigatory work to paid partisans, which is scarcely a guarantee of thorough and detached exploration"). The non-adversary advocates would be or become expert in this area, unlike many claimant representatives.

229. See generally, Mashaw, *supra* note 13, at 776-804 (full adversary structure less valuable when it cannot achieve compromise solutions).

230. Thus, the presenter model considered by the Administration would have excluded final argument from the presenter's responsibilities, while the government representative would have argued the government's case. See 45 Fed. Reg. 2345, 2347 (1980); note 198 *supra*; Letter to Frank S. Bloch, *supra* note 198.

231. See text accompanying note 207 *supra*.

232. Problems concerning the maintenance of impartiality by administrative law judges are discussed at text accompanying notes 120-21 *supra*. See also B. SCHWARZ, *supra* note 12, at 254 ("It is [the administrative law judge] who questions or, when the claimant has an attorney, cross-examines the claimant. No matter how friendly and informal the administrative law judge may try to be, the potential conflict of interest between the claimant and the agency cannot be disguised"). Noting the trend of greater claimant representation, the Commissioner of Social Security recently expressed the opinion that administrative law judges "would prefer, as anyone who has studied legal process would, to have both sides presented and to make a decision. I think you are in a much better position to make fair decisions if you hear the arguments on both sides. Nobody likes to wear more than one hat." 1979 House Hearings, *supra* note 9, at 244-45. Greater separation of administrative law judges from an active role in developing the record and presenting the case may alleviate another basis for "at least the appearance of bias in favor of the agency," that is, the fact that they are assigned specifically to the Social Security Administration

must become to meet the development or presentation responsibilities of the office, the greater the damage to the judge's traditional judicial role. Whether the administrative law judge is placed in the position of developing or refuting the claimant's case, the judges' attempts to meet these responsibilities can harm the process just as their failure to fulfill their duties undermines the process.²³³ The dilemma is noted most often in attempts by administrative law judges to cross-examine a claimant or a witness, or to counter a claimant's argument. These attempts are perceived as evidence of a lack of impartiality and can lead to a remand of the case by the courts.²³⁴

and that "[f]act-finders with great expertise in a particular area may have such strong preconceptions about certain problems that they will not be able to evaluate evidence or arguments before them fairly or accurately." Davis, *Judicialization of Administrative Law: The Trial-Type Hearing and the Changing Status of the Hearing Officer*, 1977 DUKE L.J. 389, 402. See also Thibaut, Walker & Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386, 397 (1972) (when decisionmaker has an expectation about the final result in a case, adversary, as opposed to inquisitorial, method of presenting evidence more likely to counteract bias).

233. The Commissioner of Social Security addressed the problem of administrative law judges being "placed in the position of both developing a case for the claimant and serving as the judge in the case" in recent testimony, and concluded that "[t]he administrative law judge faced with a poorly developed case cannot entirely act as a true judge. This situation should be changed." 1979 House Hearings, *supra* note 9, at 238. A statement filed at the same hearings on behalf of the Association of Staff Attorneys of the Office of Hearings and Appeals noted that "clever attorneys" representing claimants can present a very strong case and that the administrative law judge, "if he wants to become the claimant's adversary and investigate the case, . . . can possibly offset some of the evidence, where he suspects that the evidence is being manipulated. But he is not supposed to become the claimant's adversary. He is supposed to be neutral." *Id.* at 383.

234. In some instances, the questioning shows that the administrative law judge was biased. See text accompanying notes 120-21 *supra*. Cf. *Prewitt v. Celebrezze*, 330 F.2d 93, 95 (6th Cir. 1964) (finding medical records incomplete, court concluded "[w]e think the examiner was fair but he was in the position of being both judge and advocate").

The Commissioner of Social Security referred to the problem of an appearance of bias and court remands in recent testimony. See 1979 House Hearings, *supra* note 9, at 247 ("sharp questions [by the administrative law judge] may produce a record which subsequently gives the court the feeling that the claimant hasn't been accorded a fair hearing, because the administrative law judge has had to do the work that ought to be done by the representatives of the parties"); 1979 Senate Hearings, *supra* note 192, at 68 ("one of the reasons we have so many court cases is that if the [administrative law judge] is too aggressive in questioning the witness, it may set up for a court reversal"). Cf. J. MASHAW, *et al.*, *supra* note 3, at 98 ("Although the ALJ, in order to retain the appearance of objectivity, cannot utilize some of the aggressive techniques commonly thought (often mistakenly) to comprise effective cross-examination, we see no reason why his questioning cannot be as probing as that of any well-constructed cross-examination."). See also 1979 House Hearings at 379-80 (statement of Association of Staff Attorneys of Office Hearings and Appeals, that administrative law judges must cross-examine carefully to avoid being reversed by the district courts although "[a] government attorney would not be so restricted"); *McCray v. Califano*, 438 F. Supp. 128, 131 (M.D. La. 1980) ("There is a real danger that if the [administrative law judge]

Although the use of non-adversary representatives can cure at least one basic flaw of the present non-adversary system—the overextension of administrative law judge responsibilities—it does not follow that there is no place in the process for representatives who would advocate on behalf of a claimant or the government. Certainly claimants would remain entitled to bring their own representatives, but presumably the perceived need for or advantage to be gained from representation would be reduced greatly in most cases. If there are cases that the non-adversary representative cannot develop or present properly, for example, if the medical or vocational issues are particularly complex or subjective, then the administrative law judge may wish to suggest separate representation for the claimant, or perhaps for both the claimant and the government.²³⁵ Moreover, the use of non-adversary representatives would not require elimination of the administrative law judge's ultimate responsibility for the development of a complete record and the presentation of a full and fair hearing.²³⁶

III. CONCLUSION

A purely non-adversary system that relies on the administrative law judge alone to assure that decisions are based on a complete record and following a full and fair hearing does not work for many unrepresented Social Security disability claimants, or, in some instances, for an unrepresented Social Security Administration. Courts try to deal with this fact by monitoring administrative law judge performance relative to the development and presentation of the claim. Consequently, courts remand many cases for further proceedings. This is, at best, a costly and ineffective way to deal with those particular cases and is no solution for all the hearing decisions that are based on inadequate records and are not appealed. Administrative law judges simply cannot and

states in the hearing arguments against the applicant's claim, the applicant will conclude that he is taking part against her and that she is being treated unfairly.”)

235. See generally J. MASHAW, *et al.*, *supra* note 3, at 95-97; Popkin, *supra* note 1, at 1035-48; Yourman, *supra* note 19, at 1235-38.

236. The government representative experiment did not contemplate any change in the administrative law judge's ultimate responsibilities. See 45 Fed. Reg. 2345, 2347 (1980). See also Memorandum from the Commissioner of Social Security to Secretary of HEW 4 (November 23, 1979) (because under the experiment administrative law judges “should be able to devote more time and attention to determining the facts and making a decision . . . , [their] role as a judge and as the person responsible for the conduct of the hearing would not be diminished; in fact, this role should be increased”).

should not do all that is expected of them; that is, assist the claimant and at the same time “be very careful to ask the sort of questions that an attorney might ask on cross-examination,”²³⁷ because they cannot “be an equivalent substitute for a lawyer devoted exclusively to a party’s interests.”²³⁸ The introduction of non-adversary representatives into the disability determination process, hopefully together with other improvements in the initial and reconsideration levels, but perhaps more importantly if no other improvements are made, will achieve the shared goals of claimants and the public often foresaken under the present system when claimants are unrepresented: the goal that the truly disabled receive the benefits to which they are entitled. A recognition of the need for advocacy and representation at non-adversary hearings is a necessary element in the search for the proper structure for non-adversary proceedings and the inquiry into further uses for non-adversary processes in the context of other types of dispute resolutions.

237. J. MASHAW, *et al.*, *supra* note 3, at 86.

238. *Guzman v. Califano*, 480 F. Supp. 735, 737 (S.D.N.Y. 1980).