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THE ROLE OF THE ARTICLE I "TRIAL JUDGE"

EDWARD F. LUSSIER*

I. INTRODUCTION

It makes little sense to debate the worth of any role without defining its purpose and past performance. Also, it should be recognized at the outset that the field of administrative law has grown, as have other fields of law, in direct proportion to the growth of government and the need to provide fair alternatives to ever growing court dockets. No such alternatives have realistically presented themselves without simultaneous recognition that disputes which cannot be settled by agreement require a resolution process which is both perceived as fair and is productive of a record which will permit the most effective and least burdensome court review. Since most claims where the federal government is a party provide for court review[1] and because many, if not most, involve complex factual issues, and none involve juries, the role of the individual decider of fact becomes significant. All the more so because the individual judge who presides is given latitude in important matters such as discovery and admissibility of evidence and in the conduct of the evidentiary hearing[2] which directly affects the record upon which the decision will ultimately be based. No trial lawyer would regard these powers lightly in consideration of the fact that later court review will be based on that record. It is therefore of great interest to the practicing

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1. *See, e.g.*, 5 U.S.C. § 702 (1982).

2. *See, e.g.*, 20 C.F.R. § 404.944 (1983) (Social Security Administration). The regulations vary from agency to agency.

bar and to the public at large that this function is faithfully and competently discharged.

The federal government has consistently maintained high qualification standards to insure, insofar as possible, the appointment of individual trial judges based on experience and merit and to afford a level of independence not associated with other executive department positions, in recognition of the unique nature of the position and to instill public confidence in the system. The Article I judge does not have the independence or stature of the Article III federal judiciary since he is still an employee of the Executive Department and subject to its jurisdiction and appropriate control and supervision in most matters,[3] although not in the exercise of his honest and independent judgment in ruling on matters before him or deciding cases, except insofar as he is bound by lawful agency regulations. This does not, however, alter the judicial nature of the adjudicatory function involved.[4]

Much has been written about the role of administrative law judges in relationship to the agency's superior authority and about congressional policy and intent. It is not the purpose of this article to address these issues. Certainly there has been a trend toward judicialization in the administrative process and this tends to create an appearance of separation of interests but there is little question that the agency retains ultimate authority to accept or reject an ad-

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3. The administrative law judge is appointed in accordance with the Administrative Procedure Act, 5 U.S.C. § 3105 (1982). An action may be taken against an administrative law judge only if good cause is found by the Merit Systems Protection Board. *Id.* § 7521 (1982).

4. The chief senatorial sponsor of the Administrative Procedure Act attributed to it the design "to make examiners a separate and independent corps of hearing officers worthy of judicial traditions," McCarran, *Three Years of The Administrative Procedure Act—A Study In Legislation*, 38 GEO. L.J. 574, 583 (1950), and to make them "[o]n paper at least. . .very nearly the equivalent of judges, albeit operating within the federal system of administrative justice." *Id.* at 582. Perhaps the leading case in recognizing the judicial nature of the role of the federal administrative law judge is Butz v. Economou, 438 U.S. 478 (1978), where the United States Supreme Court held that such judges have an absolute immunity from liability for damages for actions taken in their quasi-judicial capacity. 438 U.S. at 514. The Court stated that "although a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations, our decisions recognize that there are some officials whose special functions require a full exemption from liability." *Id.* at 508. It went on to state that "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages," *id.* at 512-13, and that "[t]here can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is 'functionally comparable' to that of a judge." *Id.* at 513.

ministrative law judge's decision,[5] to issue federal regulations which have the force and effect of law,[6] and, in many cases, to issue precedential decisions binding on an administrative law judge.[7] This article starts with the reality that administrative law judges exist and that they exist to hear and decide cases without bias or interference.

Due process does not require in every instance a formal evidentiary hearing or require a decisionmaker possessing the qualifications of an administrative law judge or one given the statutory mantle of protection and implied independence given to administrative law judges.[8] That issue relates, however, to cases in which the federal agency chooses not to provide, and no statute requires providing, the type of trier of fact we know as the administrative law judge. When the federal commitment is made to provide the higher level right — the right to be heard by an administrative law judge — the issue of appropriate independence takes on greater meaning.

To place the issue of "independence" in proper perspective it first must be recognized that there are substantive differences between Social Security hearings and other federal agency hearings presided over by administrative law judges. However, as a starting premise it generally is conceded by all of goodwill that true independence in the sense of freedom from bias, coercion or outside influence affecting either the process of a fair hearing or the substantive decision issuing thereafter is essential in all hearings. Secondly, there should be no quaint distinction between direct interference with that purpose and subtle interference with that purpose. Both are anathema to fairness. It is a basic principle that responsibility is not given without correlative authority sufficient to carry out that responsibility.

The role of the administrative law judge in the federal government is mainly to determine facts and then apply the law. There are relatively few cases in which new legal precedent is being established or where the law is seriously in question. There are indeed federal agency proceedings where the judge's decision does serve as a precedent and, in effect, shapes the development of the law, but this is certainly not the situation in Social Security cases where the question of "independence" has most frequently been raised. The

5. 5 U.S.C. § 557(b). Each agency determines the details for agency review of administrative law judges' decisions. *See, e.g.*, 20 C.F.R. §§ 404.967-.983 (1983).

6. Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979).

7. *See, e.g.*, 20 C.F.R. § 422.408 (1983).

8. Schweiker v. McClure, 456 U.S. 188, 200 (1982); Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

few court cases which have addressed the problem have not resolved it yet since they await the resolution of factual allegations in cases still pending where crucial findings have not been made yet.[9]

The administrative law judge functioning as a fact finder must weigh evidence and assess credibility. In virtually all cases he is operating on a record different from that which the preliminary agency decisionmaker utilized, not only in the form of further documentary evidence but also in the form of live testimony. Also, quite often legal representation first surfaces at the hearing level. Despite the power and duty of the administrative law judge (other than in Social Security cases) to promote settlement, the nature of the administrative process changes and the negotiating table is exchanged for the courtroom, although that forum is still available to the parties.

In adversary hearings it is not unusual to find the full case first unveiled at the hearing. Whether this is due to the inherent nature of the proceeding with its access to discovery and right of cross examination or whether this is due to the opposing parties' realization that this is their last chance to produce evidence, the effect is the same. Positions firmly taken in initial stages of the process leading to the hearing are often tempered when the opposing side's evidence is viewed in this perspective. Firm convictions sometimes become best estimates and firm recollections only best recollections. Slight holes in the documentary record often take on larger proportions. Qualified experts concede some value to the viewpoints of opposing qualified experts and scientific fact becomes scientific opinion. If the hearing process is fair and complete, if the evidence is fully adduced and the parties properly prepared, the hearing process is well suited to arrive at the objective truth on an issue as best as humanly possible. On the other hand in nonadversarial hearings where the government is unrepresented, as in Social Security cases, the administrative law judge has a greater burden in discharging his duty to develop the evidence and is more often faced with the difficult question of credibility not so common in other cases.

The value of any system purporting to utilize an unbiased trier of fact, whether titled "trial judge," "administrative law judge," "hearing examiner" or "commissioner," rests on the integrity of the

9. Nash v. Califano, 613 F.2d 10 (2d Cir. 1980), was remanded by the court of appeals to the district court after upholding the administrative law judge's standing to sue on allegations of agency interference with his decisional independence. No further decision has been issued as of this writing. Nor has a decision been issued by the District Court for the District of Columbia in Association of Administrative Law Judges, Inc. v. Heckler, No. 83-124 (D.D.C. filed Jan. 19, 1983).

individual occupying the position. Further, it assumes a procedure reasonably calculated to assure the opportunity to hear and consider all relevant evidence and to reach a decision without outside influence. This is true whether the decision is the final decision or an intermediate decision subject to further appeal. When someone is provided by law and regulation with detailed quasi-judicial responsibilities, and explicit powers, and when rights are provided litigants, a promise is made. The promise is fulfilled only if in fact substance follows form. If this is lacking, the purpose of the procedure is frustrated. These considerations are often overlooked in discussions concentrating on the "overview" of a system and on statistical performance. Fundamentals thus become implicitly, if not expressly, relegated to a place of secondary importance or are simply assumed to be present despite evidence to the contrary. Unquestionably there are very real problems existing in agencies of the federal and state governments with respect to case backlogs and processing times.[10] Moreover, it is clear that both federal and state agencies hold the policymaking power and have the final word, subject only to court review. This does not change, however, the inherent function of the trial judge. Erroneous decisions can be reversed by a reviewing authority. Apparent conflicts in law or regulations can be remedied by new law and new regulations. Improper conduct can be dealt with by removal actions. The fact remains that a litigant who is led to believe that he will have an unbiased trier of fact who will carefully consider all the relevant evidence under a designated procedure should be given what is promised. Thus, any study of the effectiveness of the administrative hearing system must ask first whether it is doing what it is intended to do and what it holds itself out to the public as doing. This is a question of fact. It is a question of how it works and how well it works. A comparison between some federal agencies may provide some insight in this regard.

II. FEDERAL AGENCY HEARING UNDER THE ADMINISTRATIVE PROCEDURE ACT OR PATTERNED AFTER IT

The United States Postal Service is charged under federal statute with protecting the public against material false representation by mail.[11] In the Postal Service, there is an Office of Administrative

10. *See* Day v. Schweiker, 685 F.2d 19 (2d Cir. 1982), *cert. granted*, 103 S. Ct. 1873 (1983); Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978); Blankenship v. Mathews, 587 F.2d 329 (6th Cir. 1978); White v. Mathews, 559 F.2d 852 (2d Cir. 1977), *cert. denied* 435 U.S. 908 (1978); Crosby v. SSA, 550 F. Supp. 1278 (D. Mass. 1982).

11. 39 U.S.C. § 3005 (1976 & Supp. V 1981).

Law Judges empowered to hear cases brought by complaints filed by the consumer protection branch of the General Counsel's office. The cases are litigated cases in which the respondent, who is charged with violation of the false representation statute, is normally also represented by private counsel.

Although some hearings are longer, an average case is heard in less than half a day. The administrative law judge then issues a decision from which either party may appeal to the Postal Service's Judicial Officer. The Judicial Officer is a statutory position with the incumbent appointed by the Postmaster General to act finally for him.[12] The Judicial Officer then issues a final decision which, if unfavorable to the respondent, is accompanied by a mail stop order.[13] This order stops all mail addressed to the respondent unless it is clear that such mail has no connection with the offending false advertisement. The time from filing of complaint to issuance of a mail stop order is often less than 90 days.

False advertising may also be the subject of a complaint and hearing before the Federal Trade Commission. The case is heard by an administrative law judge who also issues an initial decision. The review authority is the Federal Trade Commission itself aided by supporting staff, rather than a single chief judicial officer. The time between filing a complaint and final agency decision is generally longer than at the Postal Service. Both agencies are empowered to settle the case through consent orders with the respondent and this often happens obviating the need for hearings and decisions. In both agencies the administrative law judges are completely independent in arriving at their decisions and conduct full due process hearings issuing detailed findings of fact and analysis supporting the conclusion reached. Because the complaints normally involve exaggerated claims with respect to a product, it is not unusual to have expert testimony. Generally the cases are decided on the particular facts

12. 39 U.S.C. § 204 (1976) provides:

> There shall be within the Postal Service a General Counsel, such number of Assistant Postmasters General as the Board shall consider appropriate, and a Judicial Officer. The General Counsel, the Assistant Postmasters General, and the Judicial Officer shall be appointed by, and serve at the pleasure of, the Postmaster General. The Judicial Officer shall perform such quasi-judicial duties, not inconsistent with chapter 36 of this title, as the Postmaster General may designate. The Judicial Officer shall be the agency for the purposes of the requirements of chapter 5 of title 5, to the extent that functions are delegated to him by the Postmaster General.

13. Act of November 30, 1983, Pub. L. No. 98-186, 97 Stat. 1315, now authorizes the issuance of cease and desist orders as an additional enforcement tool.

although previous cases are used as precedent. The decisions of the Postal Service administrative law judges and the judicial officer are printed and are available on request to the public.[14] The decisions of the Federal Trade Commission are published and likewise available.[15] Published case precedents are thereby provided and such precedent serves as a guide to the agency consumer protection departments in bringing later cases and to the public in knowing what to expect. The system is essentially that of an independent trial judge whose decision is subject to agency review upon motion of either party and ultimate recourse to federal court review. The system works because it provides what it promises to provide.

The role of the trier of fact in a federal agency proceeding is generally complicated by the existence of conflicting evidence. In many agencies this evidence is highly technical and there are opposing professional or scientific opinions or both. Certainly this is true in most cases involving medical issues. Very often the medical opinion relies heavily upon underlying facts which are essentially credibility issues. For example, the severity and extent of pain relating to an objective injury also involves subjective factors and credibility of a witness. Whether or not an important and material conversation took place likewise may depend upon a determination of credibility. Questions of an individual's participation in certain alleged activities or knowledge of a certain fact, or receipt of a particular notice all involve an issue of credibility. While there may be substantial corroborating documentary evidence there often is not and unless testimony is to be considered completely irrelevant it must be weighed. There is little need for a hearing in the normal sense of the word unless testimony is to be taken and given some weight. While there is always the so called "clear cut" case, the majority of cases unfortunately still require the resolution of conflicting evidence and the evaluation of live testimony. In fairness, something more than a paper review is required. In all of the agencies that utilize administrative law judges, recognition of this fact is found not only in the establishment of a system providing hearings but also in the detailed regulations and rules governing the process. Federal court cases reviewing agency decisions are replete with holdings representing the judicial expectation that such hearings be complete and fair in all respects, with full consideration given to all of the evidence and that

14. These decisions are available for public inspection in the Postal Services Headquarters Library in Washington, D.C. 39 C.F.R. § 265.6(a)(2) (1983).

15. See the Federal Trade Commission reporter.

such consideration be reflected in the agency's written decision.[16] Dependent upon the particular subject matter jurisdiction in a given agency, argument might be made that a different process would be better suited to carrying out the agency function. Once a need for an unbiased hearing is conceded, however, the need for a trial judge becomes self-evident.

In addition to administrative law judges appointed under the Administrative Procedure Act,[17] federal agencies employ administrative judges in other areas not specifically covered by the Act. This further illustrates recognition of the value of the administrative trial proceeding and its effectiveness.

The federal government is the largest purchaser in the world. It is engaged in buying supplies and equipment, in research, in construction and in numerous other programs. All of this is done through federal contracts and these contracts provide for processing of claims, either by or against the government, and resolution of disputes through an administrative hearing process governed by a Board of Contract Appeals utilizing administrative judges. Although the Board's hearing process is not governed by the Administrative Procedure Act, its judges are appointed under stringent standards and act independently of federal agency influence.

Most major federal departments have a Board of Contract Appeals and those that do not have delegated that responsibility to another Agency's Board of Contract Appeals.[18] The hearings are adversary proceedings, generally with counsel for each party. One administrative judge will hear the case as trial judge. A transcript of the hearing is available to him and that judge, if still available, will prepare the decision, which is then submitted to a panel of the Board

16. *See* Heckler v. Campbell, 103 S.Ct. 1952 (1983); Gallagher v. Schweiker, 697 F.2d 966 (11th Cir. 1982); Simpson v. Schweiker, 691 F.2d 966 (11th Cir. 1982); Wiggins v. Schweiker, 679 F.2d 1387 (11th Cir. 1982); Smith v. Schweiker, 677 F.2d 826 (11th Cir. 1982); Hankerson v. Harris, 636 F.2d 893 (2d Cir. 1980); Marcus v. Califano, 615 F.2d 23 (2d Cir. 1979); Newborn v. Harris, 602 F.2d 105 (5th Cir. 1979); Rico v. Secretary, 593 F.2d 431 (1st Cir.), *cert. denied*, 444 U.S. 858 (1979); Northcutt v. Califano, 581 F.2d 164 (8th Cir. 1978); Beavers v. Secretary, 577 F.2d 383 (6th Cir. 1978); Daniel v. Mathews, 567 F.2d 845 (8th Cir. 1977); Thorne v. Weinberger, 530 F.2d 580 (4th Cir. 1976); Coulter v. Weinberger, 527 F.2d 224 (3d Cir. 1975); Miranda v. Secretary, 514 F.2d 996 (1st Cir. 1975); Yawitz v. Weinberger, 498 F.2d 956 (8th Cir. 1974); DePaepe v. Richardson, 464 F.2d 92 (5th Cir. 1972); Bittel v. Richardson, 441 F.2d 1193 (3d Cir. 1971); Kutchman v. Cohen, 425 F.2d 20 (7th Cir. 1970); Mark v. Celebrezze, 348 F.2d 289 (10th Cir. 1965); Celebrezze v. Warren, 339 F.2d 833 (10th Cir. 1964).

17. 5 U.S.C. § 3105 (1982).

18. Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (codified at 41 U.S.C. §§ 601-613 (Supp. V 1981)).

if it is a large Board, such as the Armed Services Board of Contract Appeals, or to the full Board if it is a small Board, such as the Postal Service Board of Contract Appeals, where the file is reviewed by each Board member participating. Concurring and dissenting opinions may be written. A majority vote controls the decision. These decisions are published decisions and used as precedent in future cases. There is no further agency review. There is the right to court review but it is not commonly pursued which may be taken as a tribute of sorts to the competence of the decisions being issued.

These administrative judges thus perform two functions. The first is as a trial judge. The second is as a concurring or dissenting member on review of a case. On review of a case, those judges that have reviewed the file and read the briefs and draft decision collaborate in the way appellate judges might, to arrive at a consensus before the decision is finally released. This system has been recognized as effective over the years by the executive departments, by the practicing bar, by the Judiciary and by the Congress.[19]

The establishment of Boards of Contract Appeals grew out of a need to arrive at the resolution of claims without resort to the courts.[20] By virtue of utilization of the Boards of Contract Appeals, however, there is built up a substantial base of precedential law in the federal procurement law field. This has been beneficial to those who deal with the government as well as to those who act on its behalf. The government must manage extensive programs under multiple regulations and numerous contract clauses which, standing alone do not resolve all possible questions and, of course, cannot resolve fact disputes. The decisions of the Boards of Contract Appeals fill this need.

Needless to say the Boards' decisions are not always favorable to the government agency presenting its side of the dispute. This has not produced an antipathy between agencies and administrative judges serving on their Boards of Contract Appeals. Rather, there is a feeling of general respect despite disagreement with any particular result. In fact, it was largely through the efforts of the federal pro-

19. S. REP. NO. 1118, 95th Cong., 2d Sess. 2-4 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5235, 5236-38.

20. It might be said that because the total dockets of these Boards are probably less than four thousand cases, it would not unduly burden the court system to have these cases heard in court. The number of cases is not necessarily revealing however. The last case the author heard as a judge on the Armed Forces Board of Contract Appeals involved a claim for thirty-seven million dollars and lasted sixty-seven full trial days. It was then settled at which time the attorneys estimated that to complete the trial presentation would take at least another sixty-seven trial days.

curement bar that a model code was developed for state and local procurement fashioned after the federal experience.[21]

III. Social Security Hearings

The hearing procedures in Social Security cases as set forth in the federal regulations[22] provide the same essential rights to claimants as are found in other federal agency hearings. They are not adversary hearings, however, because there is no attorney present to advocate the government's position.[23] Moreover, pleadings, normally required in other federal agency hearing procedures, are not required.

The discovery procedures common to many other federal administrative hearings are not generally employed in Social Security hearings, although subpoena powers exist and claimants have the right to cross-examination. Upon proper motion, claimants may cross-examine the government examining physicians and, of course, any medical or vocational expert, called by the administrative law judge to testify at the hearing.[24] The administrative law judge is charged with the additional function of ensuring that missing material reports are obtained,[25] a function not normally assigned to the

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21. Model Procurement Code (1979).

22. 20 C.F.R. §§ 404.900-.995, 416.1400-.1494 (1983).

23. The Social Security Administration has established a government representative program which at this writing is still in a test stage but in any event is not expected to include the majority of cases being heard. 20 C.F.R. §§ 404.965, 416.1465 (1983).

24. Any party to a hearing has a right to appear before an administrative law judge and to present evidence. 20 C.F.R. § 404.950(a), 416.1450(a) (1983).

25. Smith v. Schweiker, 677 F.2d 826, 829 (11th Cir. 1982); Hankerson v. Harris, 636 F.2d 893, 895 (2d Cir. 1980); Daniel v. Mathews, 567 F.2d 845, 848 (8th Cir. 1977); Coulter v. Weinberger, 527 F.2d 224, 229 (3d Cir. 1975); *see also* the concurring opinion of Justice Brennan in Heckler v. Campbell, 103 S.Ct. 1952 (1983) in which he states in pertinent part:

> I join the Court's opinion. It merits comment, however, that the hearing respondent received,. . .if it is in any way indicative of standard practice, reflects poorly on the Administrative Law Judge's adherence to what Chief Judge Godbold has called his "duty of inquiry":
>
> > [T]here is a 'basic obligation' on the [administrative law judge] in these nonadversarial proceedings to develop a full and fair record, which obligation rises to a "special duty . . . to scrupulously and conscientiously explore for all relevant facts" where an unrepresented claimant has not waived counsel. This duty of inquiry on the [administrative law judge] would include, in a case decided under the grids, a duty to inquire into possible nonexertional impairments and into exertional limitations that prevent a full range of work.

Id. at 1959 (Brennan, J., concurring) (quoting Broz v. Schweiker, 677 F.2d 1351, 1364 (11th Cir. 1982)). After citing many cases Justice Brennan continued:

trier of fact. The Social Security judge also carries the burden of conducting the examination of the claimant and other witnesses at the hearing when the claimant is unrepresented and, where the claimant is represented, of conducting sufficient examination to complete the testimony to his satisfaction.

The judge may call upon a medical or vocational expert to testify at the hearing, and has the further obligation to develop additional medical evidence after the hearing if that appears appropriate. For example, a claimant may appear at a hearing with a medical report indicating a recent development of, or new medical opinion regarding his or her physical condition which requires further examination or the input of independent medical opinion. It may be clear from the hearing testimony or a report received at the hearing that psychological testing is important and therefore it will be ordered at government expense. A fair proportion of disability cases involve psychiatric impairments or combined psychiatric and physical impairments and the difficulties in assessing the existence and actual effect of such impairments often present extremely complex factual judgments.[26]

The problem in assessing pain allegations also can be readily recognized. It is illustrated in the numerous court decisions remanding cases for further detailed consideration of such allegations even in the absence of clear clinical findings supporting the allegations.[27]

> The "duty of inquiry" derives from claimants' basic statutory and constitutional rights to due process in the adjudication of their claims, including a *de novo* hearing, [*see* Mathews v. Eldridge, 424 U.S. 319, 332-335, 339 (1976), Richardson v. Perales, 402 U.S. 389, 402-404 (1971). *See also* Goldberg v. Kelly, 397 U.S. 254, 262-263 (1970)]. Inherent in the concept of a due process hearing is the decisionmaker's obligation to inform himself about the facts relevant to his decision and to learn the claimant's own version of the facts. [Goss v. Lopez, 419 U.S. 465, 580 (1975).]

Id. at 1959 n.1. Justice Brennan noted that "in her brief to this Court, the secretary acknowledges that the Social Security regulations embody this duty and relies upon it in answering respondent's Due Process contentions." *Id.* at 1959-60.

26. Not only is it common to find a difference of medical opinion in the record but there is often apparent conflict between the opinion given in support of a patient's disability claim and the doctor's own treatment notes or his reports to other sources. Beyond that there is the critical question of how the medical impairment in fact functionally restricts the particular individual, an issue rife with subjective considerations, and one which can become even more ethereal where claims of psychiatric illness are alleged. An attorney representing a client in a non-adversary hearing, must strictly adhere to the bar's standards of ethical conduct in presenting documentary evidence and sworn testimony. Since the witnesses' credibility depends in large part upon compliance with their oath to tell the truth, the whole truth and nothing but the truth, the attorney must, to the best of his or her ability, see that this is done.

27. It is well established law in all the federal circuits that the administrative law

The problem may be put into proper perspective best by asking how this can be done without simply accepting the allegations and thereby converting the disability process into a self certification procedure, a result certainly not intended by the law. Clearly, the question is a factual question. Just as clearly, without outside investigation, the corroboration of the allegations and the proof to show the true functional restrictions in a given case is going to be less than what one would normally expect in a litigated personal injury case, for example, where the amount of money at stake may in fact be far less than in the average disability hearing.[28] Obviously the taxpayer has an interest in seeing that some reasonable accomodation is made to provide a reasonably fair result and this requires at a bare minimum a detailed review of every observation in the written record, a complete examination of the witnesses and a thorough comparison for inconsistencies. When it is considered that medical reports provided by treating and consulting physicians sometimes consist of sparse clinical findings and conclusions based principally on the claimants statements of symptoms the magnitude of the credibility issue[29] comes into finer focus, and so then does the importance of the role of the trier of fact.

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judge has the duty to evaluate and assess subjective complaints. Gallagher v. Schweiker, 697 F.2d 82, 83-84 (2d Cir. 1983); Simpson v. Schweiker, 691 F.2d 966, 970 (11th Cir. 1982); Wiggins v. Schweiker, 679 F.2d 1387, 1391 (11th Cir. 1982); Marcus v. Califano, 615 F.2d 23, 27 (2d Cir. 1979); Newborn v. Harris, 602 F.2d 105, 107 (5th Cir. 1979); Rico v. Secretary, 593 F.2d 431, 433 (1st. Cir.) *cert. denied*, 444 U.S. 858 (1979); Northcutt v. Califano, 581 F.2d 164, 166 (8th Cir. 1978); Beavers v. Secretary, 577 F.2d 383, 386 (6th Cir. 1978); Thorne v. Weinberger, 530 F.2d 580, 583 (4th Cir. 1976); Miranda v. Secretary, 514 F.2d 996, 1000 (1st Cir. 1975); Yawitz v. Weinberger, 498 F.2d 956, 957 (8th Cir. 1974); DePaepe v. Richardson, 464 F.2d 92, 99 (5th Cir. 1972); Bittel v. Richardson, 441 F.2d 1193, 1195 (3d Cir. 1971); Kutchman v. Cohen, 425 F.2d 20, 23-24 (7th Cir. 1970); Mark v. Celebrezze, 348 F.2d 289, 292 (10th Cir. 1965); Celebrezze v. Warren, 339 F.2d 833, 838 (10th Cir. 1964).

28. The significant economic impact not only for the claimant as an individual but for the tax paying public is highlighted by the volume of claims (over 300,000 requests for hearing in fiscal year 1982), in what has been termed "probably the largest adjudicatory system in the western world," Heckler v. Campbell, 103 S.Ct. 1952, 1954 n.2 (1983) (quoting J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARTZ & P. VERKUIL, SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM xi (1978)), and by the amount of money involved, which has been estimated as high as $100,000 per case in remarks attributed to then Associate Commissioner Louis B. Hays at the Federal Administrative Law Judges Conference on March 14, 1983. Federal Administrative Law Judges Conference Letter (April 28, 1983). Further, the number of cases pending in the federal Districts Courts has risen dramatically with twice as many cases being filed in fiscal year 1983 as in fiscal year 1982.

29. It is well settled that the administrative law judge is expected to make credibility findings. *See, e.g.,* Tieniber v. Heckler, 720 F.2d 1251, 1254 (11th Cir. 1983); Andrews v. Schweiker, 680 F.2d 559, 561 (8th Cir. 1982); Walker v. Matthews, 546 F.2d 814, 820

Social Security administrative law judges' monthly production figures over the past five years show substantial increases.[30] Additional support staff and word processors are partially responsible. Production "goals" of twenty-five case dispositions per month have risen to forty or fifty in an attempt to keep pace with increases in the number of requests for hearings. Low producing judges are counseled and in some cases formal removal actions have been instituted. There is no indication that there is any policy to counsel judges producing sixty to one hundred case dispositions per month. However, it is obvious that there are differences in perception as to how much time a judge needs to spend on a case to reasonably carry out his duties. These differences necessarily implicate the practical aspects of thoroughly obtaining and reviewing the documentary evidence and of conducting thorough inquiry at the hearing. Public concern with this inconsistency is perhaps muted by high reversal rates.[31] A quick hearing and short decision is quite acceptable to the claimant who has won his case. Nevertheless administration concern with the rise in reversal rates, paralleling increased receipts and calls for increased productivity, resulted in abolishment of the short form memorandum decision in reversal cases and the substitution of the requirement that all decisions be long form decisions explaining the rationale for the reversal.[32]

Human nature being what it is, some judges who are pressured to get out more cases in a non-adversary setting may find it easier to speed things up by acting more on instinct than on thoroughness. If that is done, of course, the ultimate loser is either the claimant or the

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(9th Cir. 1976); Melendez v. Schweiker, 550 F. Supp. 1294, 1295 (D. Mass. 1982); Selewich v. Finch, 312 F. Supp. 191, 195 (D. Mass. 1969).

30. The number of requests for administrative law judge hearings in the area of disability benefits has risen from 226,200 in 1979 to 326,300 in 1982. The number of requests processed has increased from 210,775 in 1979 to 300,000 in 1982. S. REP. NO. 648 97th Cong., 2d Sess. 20 (1982), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 4373, 4391.

31. In the first quarter of 1982 the percent of cases reversed after initial denials was 57.3 and after terminations was 65.4. *Id.*

32. The concern is further reflected by the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 304(g), 94 Stat. 441 (codified at 42 U.S.C. § 421 (Supp. V 1981)), which required an ongoing review of administrative law judge decisions by the Social Security Administration. Commonly referred to as the "Bellmon review" the requirement grew out of congressional concern over the high percentage of cases that were being granted by administrative law judges. The question is not free of controversy. *See* SUBCOMM. ON OVERSIGHT OF GOV'T MANAGEMENT OF THE SENATE COMM. ON GOV'TAL AFFAIRS, THE ROLE OF THE ADMINISTRATIVE LAW JUDGE IN THE TITLE II SOCIAL SECURITY DISABILITY INSURANCE PROGRAM, S. REP. NO. 111, 98th Cong., 1st Sess. (1983).

taxpayer depending upon the result, but consistency also suffers as does integrity. When conflicting interests are not properly balanced, the result is a subtle corrosion. Whether this is stated in terms of intrusion upon the "independence" of the judges or "due process" or meeting "goals" matters little for what is contemplated by law is frustrated in fact. The problem is created by a number of factors: the enormity of the caseload; the complexity of the cases; the absence of truly objective standards;[33] the tendency of the courts to impose deadlines on processing;[34] the desire of the agency to obtain "uniformity" despite the unique nature of each case and the clash of two different disciplines; the policy makers and administrators, who are inclined to view the larger picture in terms of dollars and case dispositions; and the judges, who are inclined to view the individual case.

Unless truly objective standards can be developed and promulgated there will continue to be, as there is in all litigation, the need for the trier of fact. As long as there is such a need, one thing is clear: The solution does not lie in diluting the judge's role because there are no short cuts to that form of justice.

IV. CONCLUSIONS

Given the scope of federal and state administrative hearings, it is , or at least should be, evident to the practicing bar that sooner or later most practicing lawyers will find themselves with a client who must pursue the administrative hearing route as a substitute for, or prerequisite, to any court action. Because of burgeoning court dockets and the widely accepted agency hearing process before a qualified judge insulated from outside influence, it can be expected that this process will expand rather than contract. Nor is it idle speculation to expect that ever increasing admissions to the bar and broader awareness, or evolving establishment, of legal rights will increase

33. Judges, no matter how experienced in hearing and deciding medical cases are not medical doctors. It is simplistic to say that conflicting medical opinion is easily resolved by lay people by reference to "objective" medical evidence. This is particularly true because the federal courts require concise judicial evaluations of pain and require that substantial weight be given to opinions of treating physicians. Wiggins v. Schweiker, 679 F.2d 1387, 1389 (11th Cir. 1982); Walden v. Schweiker, 672 F.2d 835, 840 (11th Cir. 1982); Smith v. Schweiker, 646 F.2d 1075, 1081 (5th Cir. 1981). If it were simple to quantify objective medical evidence in terms of functional restrictions, then regulations would exist to control particular decisions. Such regulations do not exist, however, except in the most clear cut cases. *See* 20 C.F.R. §§ 404.1501-.1599 app. (1983).

34. Day v. Schweiker, 685 F.2d 19 (2d Cir. 1982), *cert. granted*, 103 S.Ct. 1873 (1983)(No. 82-1371); Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978); Blankenship v. Mathews, 587 F.2d 329 (6th Cir. 1978); White v. Mathews, 559 F.2d 852 (2d Cir. 1977), *cert. denied* 435 U.S. 908 (1978); Crosby v. SSA, 550 F. Supp. 1278 (D. Mass. 1982).

caseloads significantly in some areas. The lawyer advising corporate clients involved, even tangentially, with federal or state contract or grant programs will soon discover that some knowledge in these areas may be vital to a client's interests. If these areas are considered too broadly as "specialty" areas, the time to consult the specialist may be too late and the evidence to prove the case too little since concurrent records far surpass later recollection. The latter principle applies equally to individual clients in many areas, the most evident of which is where causation and resultant damage issues are involved and most certainly in any claim involving medical issues. Administrative law, once considered a highly specialized field of little interest to the general practitioner, is now a field which touches all areas in the practice of law. Thus an awareness of its varied processes is as important to the bar as is a knowledge of substantive law.

The worth of any adjudicatory system of course can also be measured by other standards such as its economic feasibility, its public acceptance or its political implications, to mention but a few. Alternative processes may, in one or more areas, have greater merit. What is important to bear in mind, however, is that the nature of such alternatives is in reality vastly different from the existing process. Thus, the not so subtle impact of having a judge's pay raises rest in the hands of supervisors who have valid concerns with production quotas, processing times and the cost of the program, measured in part by the decisional results, can justifiably be said to interfere with the integrity of the decision process. This fact was clearly recognized by Congress and resulted in the passage of the Administrative Procedure Act. Substitute procedures involving minimal "due process" mandated by practical considerations and the breadth of legal rights are found in controlling court decisions[35] but are based on limiting rights to the type of hearing contemplated by the Administrative Procedure Act and should not be equated to it. Once that right is granted it should not be watered down by practical and policy considerations so that it loses its intended purpose. Rather those considerations should encourage finding ways to provide the right more effectively by eliminating flaws in the system to the extent possible but always consistent with the true purpose of the hearing procedure. This problem takes on much larger proportions in facing the enormous workload of an agency such as the Social

35. Schweiker v. McClure, 456 U.S. 188 (1982); Mathews v. Eldridge, 424 U.S. 319 (1976).

Security Disability Program than it does in other federal agencies. Nevertheless, the principle should be the same as long as the recognized method of deciding cases is the hearing process. Congressional action in the Social Security area has concentrated primarily on protection of claimants' rights and changes in Social Security procedures apart from the hearing procedure. The federal court cases however have been virtually unanimous in recognizing and enforcing the duty of administrative law judges to provide fully and exactly what the Administrative Procedure Act and federal regulations require in hearing and deciding cases.[36] There is no question but that those who are disabled should be given benefits. The corollary is that those who are not disabled should not be given benefits. In a hearing process which has only one side appearing, it is all the more incumbent on the trial judge to be thorough to insure that justice is done.

Whether a different or less involved procedure would meet the requirements of due process is determined by the three prong test set forth by the U.S. Supreme Court in *Mathews v. Eldridge*.[37] *Mathews* requires an analysis of the private interest to be protected, the effectiveness of existing procedures in reasonably guaranteeing those rights and the pros and cons of additional or substitute procedures.[38] If the question is, however, whether the federal administrative hearing procedure as currently mandated by federal law and regulation can provide what it promises to the public, the answer is clear. It can if the federal agency wants it to do so and if the administrative law judges fully and faithfully carry out their sworn duty. The agency demonstrates its intent in direct proportion to the extent it cooperates in supporting and honoring its obligations set forth in its own regulations establishing that procedure. Justice requires the effective recognition and protection of lawful rights and correspondingly the enforcement of lawful obligations. It requires the fair resolution of

36. Heckler v. Campbell, 103 S. Ct. 1952 (1983); Gallagher v. Schweiker, 697 F.2d 966 (11th Cir. 1982); Simpson v. Schweiker, 691 F.2d 966 (11th Cir. 1982); Wiggins v. Schweiker, (11th Cir. 1982); Hankerson v. Harris, 636 F.2d 893 (2d Cir. 1980); Marcus v. Califano, 615 F.2d 23 (2d Cir. 1979); Newborn v. Harris, 602 F.2d 105 (5th Cir. 1979); Rico v. Secretary, 593 F.2d 431 (1st Cir.), *cert. denied*, 444 U.S. 858 (1979); Northcutt v. Califano, 581 F.2d 164 (8th Cir. 1978); Beavers v. Secretary, 577 F.2d 383 (6th Cir. 1978); Daniel v. Mathews, 567 F.2d 845 (8th Cir. 1977); Thorne v. Weinberger, 530 F.2d 580 (4th Cir. 1976); Coulter v. Weinberger, 527 F.2d 224 (3d Cir. 1975); Miranda v. Secretary, 514 F.2d 996 (1st Cir. 1975); Yawitz v. Weinberger, 498 F.2d 956 (8th Cir. 1974); DePaepe v. Richardson, 464 F.2d 92 (5th Cir. 1972); Bittel v. Richardson, 441 F.2d 1193 (3d Cir. 1971); Kutchman v. Cohen, 425 F.2d 20 (7th Cir. 1970); Mark v. Celebrezze, 348 F.2d 289 (10th Cir. 1965); Celebrezze v. Warren, 339 F.2d 833 (10th Cir. 1964).

37. 424 U.S. 319 (1976).

38. *Id.* at 335.

factual disputes applying accepted principles of lawful authority. It is therefore incumbent upon policy makers and administrators, and not only upon judges, to cooperate in seeing that this is done. If the cost in terms of time or money is too high that is a determination that should be openly addressed jointly by those who make the law and those who set policy and administer programs but not by judges who take an oath to faithfully carry out their responsibility to provide what the existing law requires. The judge's singular interest is, and should be, only to render an impartial decision after thorough inquiry and review. When these functions are merged they tend to compromise in practice what should only be compromised by orderly, open, legislative and regulatory processes. In this process the practicing bar has an obligation to become better informed and to take an active part, not so much from a self interest standpoint, but from the higher standpoint of securing an orderly and effective system of justice intended to serve not only individual interests but the public at large.