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Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications

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DEVELOPING A FULL AND FAIR EVIDENTIARY RECORD IN A NONADVERSARY SETTING: TWO PROPOSALS FOR IMPROVING SOCIAL SECURITY DISABILITY ADJUDICATIONS*

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* This article is based on a report written by the authors that was commissioned by the Social Security Advisory Board ("SSAB"). The original report, which was submitted to the SSAB in June 2003, includes appendices that contain the record of extensive interviews with government officials and claimants representatives conducted by the authors and the SSAB in the course of preparing the report as well as excerpts from congressional testimony on government representation and closing the record. *See* INTRODUCING NONADVERSARIAL GOVERNMENT REPRESENTATIVES TO IMPROVE THE RECORD FOR DECISION IN SOCIAL SECURITY DISABILITY HEARINGS (June 11, 2003), *available at* http://www.ssab.gov/blochlubbersverkuil.pdf. In a letter acknowledging receipt of the report, the Board noted its continuing interest in a government representative at Social Security disability hearings without accepting or rejecting any of the recommendations presented in the report. *Id.* An earlier related report to the SSAB by Professors Verkuil and Lubbers, ALTERNATIVE APPROACHES TO JUDICIAL REVIEW OF SOCIAL SECURITY DISABILITY CASES (Mar. 1, 2002), *available at* http://www.ssab.gov/VerkuilLubbers.pdf, is to be published in 55 ADMIN. L. REV. ___ (2003) (forthcoming).

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INTRODUCTION AND OVERVIEW

At first blush, it might seem odd that matters like closing a record or providing government representation in administrative hearings are at all controversial. After all, if one views government decisionmaking from a judicial or formal Administrative Procedure Act ("APA")[1]

[1] Pub. L. No. 404, 60 Stat. 237, Ch. 324, §§ 1-12. Codified by Pub. L. No. 89-554 (1966) *in*

perspective, these are basic propositions. But Social Security Administration ("SSA") disability decisions take place in a different world, where the claimant is viewed as a potential beneficiary and the government as a supportive force, and where procedures are allocated accordingly. SSA hearings are one of the few types of proceedings where the agency is unrepresented and where the record is left open throughout the administrative appeals process to ensure that the claimant's file is complete. The debate over adversary and non-adversary decisionmaking is perhaps most persistent in the world of government disability adjudication.[2] Despite the use of administrative law judges ("ALJ"s) at SSA hearings, which usually signals use of the formal adjudication provisions of the APA,[3] the process is still considered informal and non-adversarial.[4] We have sought to respect the different approach to adjudication in disability cases while exploring possible changes in current practice relative to government representation and closing the record.[5]

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5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 5372, 7521 (2003).

[2] *See, e.g.*, Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 323-26 (1985) (extolling the virtues of the Veterans' Administration's system of non-adversary "paternalistic" adjudication).

[3] *See* 5 U.S.C. §§ 554, 556-57 (2003). SSA disability adjudications are the only instance where administrative law judges ("ALJ"s) are employed without regard to the formal adjudication processes of the APA.

[4] *See* Richardson v. Perales, 402 U.S. 389 (1971) (discussing ALJ's "three-hat" role). *See also* Broz v. Schmeiker, 677 F.2d 1351, 1364 (11th Cir. 1982) (ALJ has a "duty of inquiry" where claimant is unrepresented). However, the debate over the use of non-ALJ adjudicators is a wider one. *See, e.g.*, William F. Funk, *Close Enough for Government Work?: Using Informal Procedures for Imposing Administrative Penalties*, 24 SETON HALL L. REV. 1 (1993), Jeffrey S. Lubbers, *APA Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65 (1996).

[5] Current practices are, of course, subject to change and as this article was going to press SSA proposed significant new modifications to the disability adjudication process. On September 25, 2003, the Commissioner of Social Security, Jo Anne B. Barnhart, testified before the House Subcommittee on Social Security concerning SSA's management plans. She cited the authors' report as support for several modifications contained in her testimony (and discussed later in this article). These include closing the record after the ALJ hearing and appointing a "Reviewing Official" who would be responsible for reviewing state Disability Determination Service ("DDS") decisions and also would prepare prehearing reports before the ALJ hearing. In addition, Commissioner Barnhart recommends eliminating the DDS reconsideration phase and replacing Appeals Council review with a centralized quality control process, followed, where necessary, by review of an oversight panel (consisting of two ALJs and an "Administrative Appeals" judge). These modifications, to be implemented by regulations effective October 2005, are designed to reduce processing time "by at least 25%" and to increase "decisional consistency and accuracy." *See Hearing on the Social Security Administration's Management of the Office of Hearings and Appeals: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 108th Cong. (2003) [hereinafter Barnhart Statement] (statement of Jo Anne B. Barnhart, Commissioner, Social Security Administration). *See also Hearing on the Social Security Administration's Management of the Office of Hearings and Appeals: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 108th Cong. (2003) [hereinafter Schieber Statement] (statement of Sylvester J. Schieber, Member, Social Security Advisory Board). The modifications and recommendations contained in the Barnhart Statement

This article proceeds as follows: Part I explains why this article is timely and how it fits in against the background of prior studies and reports from the SSAB, the SSA and other organizations. Part II provides an overview of the Social Security disability determination process. Part III describes current regulations and practices that relate to compiling the record for decision. Part IV discusses the SSA's mid-1980's experiment with government representatives at disability hearings, the SSA Representation Project ("SSARP"), and the federal district court case, *Salling v. Bowen*,[6] that enjoined the SSARP as a violation of due process. Those who oppose any further SSA experimentation with representatives tend to rely on the SSARP experience and the *Salling* case. This part also shows that the SSARP involved an adversarial approach to representation that we seek to distinguish from the approach recommended in this article. Part V presents our analysis of the primary problem that gives rise to questions about whether the government should be represented at Social Security hearings and when the record should be closed: Social Security disability decisions are often made on the basis of an incomplete and ever-changing evidentiary record. It also explains how this problem can be addressed most effectively in the context of examining the issues raised by government representation and closing the record. Part VI describes and supports our specific recommendations. It also addresses the question of whether any statutory change or new regulations might be required to implement our recommendations.

I. BACKGROUND

The issues raised by this article are not new. As discussed in detail later in Part IV of this article, the Social Security Administration conducted a controversial experiment in the mid-1980's in which SSA was represented by government attorneys at disability hearings in selected hearing offices; notwithstanding SSA's decision to terminate the experiment following the entry of a district court injunction from which it did not appeal,[7] knowledgeable observers have expressed renewed interest in this idea.[8] Similarly, the idea of changing the SSA's

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and the Schieber Statement are discussed further in this article *infra* notes 99, 109, 257-58, and accompanying text.

[6] 641 F. Supp. 1046 (W.D. Va. 1986).

[7] *See Salling*, 641 F. Supp. 1046. *See also infra* Part IV.C.

[8] *See, e.g.*, EVALUATION OF SSA'S DISABILITY QUALITY ASSURANCE (QA) PROCESSES AND DEVELOPMENT OF QA OPTIONS THAT WILL SUPPORT THE LONG-TERM MANAGEMENT OF THE DISABILITY PROGRAM, Report to the Social Security Administration by The Lewin Group, Inc., Pugh Ettinhger McCarthy Associates, L.L.C. & Cornell University 22-23 (Mar. 16, 2001) (hereinafter LEWIN REPORT).

"open file" system[9] has been suggested many times over the years by various advisory bodies and specialists in the field.[10] The SSAB recommended recently that both ideas be given serious consideration and this article responds to that recommendation.[11]

These suggestions deserve renewed attention due to an increasing administrative caseload at SSA and the rise in private representation of claimants seeking disability benefits. The number of disability claims is expected to increase substantially in the future for several reasons: (1) the impending retirement of Baby Boomers;[12] (2) the downturn of the economy in the last several years;[13] (3) the resumption of continuing disability reviews ("CDRs") by the SSA;[14] and (4) the increasing tendency of private insurance companies to require, as a condition of payments, that claimants pursue offsetting SSA disability benefits.[15] In addition, these figures do not reflect the 75,000 Medicare cases a year heard by SSA in FY 2002,[16] a figure that may increase markedly due to

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9 Currently, additional evidence can be added to the record, with only limited restrictions, throughout the administrative appeals process. *See infra* Part III.B.

10 *See, e.g.*, LEWIN REPORT, *supra* note 8, at 23; Administrative Conference of the U.S., Recommendation 90-94, *infra* note 29, at ¶ 4.

11 *See, e.g.*, SOCIAL SECURITY ADVISORY BOARD, CHARTING THE FUTURE OF SOCIAL SECURITY'S DISABILITY SYSTEM: THE NEED FOR FUNDAMENTAL CHANGE 19-21 (Jan. 2001), *available at* http://www.ssab.gov/disabilitywhitepap.pdf.

12 *See* Statement of Stanford G. Ross, Chairman Social Security Advisory Board at the Tenth National Educational Conference, Association of Administrative Law Judges (Oct. 3, 2001) ("SSA actuaries project continued rapid growth as the baby boomers reach the greater likelihood of disability."); SSAB, AGENDA FOR SOCIAL SECURITY: CHALLENGES FOR THE NEW CONGRESS AND THE NEW ADMINISTRATION, 1-2, 16, 37 (Feb. 2001), *available at* http://www.ssab.gov/Overview1.pdf. Baby Boomers will begin to reach the age of 65 in 2011 and finish reaching 65 in 2030. When they begin to retire in 2011, there will be 40.4 million seniors (or 13% of the population) and that will grow to 70.3 million (20% of the population) by 2030. *See also* Press Release, U.S. Census Bureau, Census Bureau Projects Doubling of Nation's Population by 2100 (Jan. 13, 2000).

13 While the disability program is not an employment scheme, applications rise when the economy falters. In April 2000, the national unemployment rate was 3.8%; in December 2002, it was 6.0%—an increase of 58%. *See* U.S. Department of Labor, Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, *available at* http://data.bls.gov/cgi-bin/surveymost.

14 The SSA has completed its seven-year CDR plan, commenced in 1996. The plan is part of the agency's response to the Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (1993). It calls for increasing annual CDRs from 603,000 in 1997 to 1.7 million in 2002 with a peak year of 1.8 million in 2000. *See* OFFICE OF INSPECTOR GENERAL, SOCIAL SECURITY ADMINISTRATION, REPORT NO. A-01-99-91002, AUDIT REPORT: PERFORMANCE MEASURE REVIEW: RELIABILITY OF THE DATA USED TO MEASURE CONTINUING DISABILITY REVIEWS (June 2000), at A5-A6. Our report takes no position on revisions to the CDR program.

15 *Cf.* D. Gregory Rogers, *The Effects of Social Security Awards on Long-Term Disability Claims*, 1 ATLA ANNUAL CONVENTION REFERENCE MATERIALS 1117 (July 2001). Conversations with the SSAB have also created a suspicion that private insurance policies are beginning to require appeals through the ALJ stage before payment of insurance benefits, but the situation is too recent for data to have been compiled.

16 *See* SSA KEY WORKLOAD INDICATORS 8 (FY 2002) [hereinafter KEY WORKLOAD INDICATORS].

changes in the Medicare laws, which make certain coverage determinations subject to review by administrative law judges.[17] Recent caseload figures show that receipts by SSA ALJs are increasing. After falling to a six-year low of 455,192 in FY 1999 the caseload was 491,404 in FY 2000 and 525,383 in FY 2002.[18] These caseload realities make it more difficult for the SSA to achieve decisions that are uniform, fair, and timely.

In addition to the pressure of mounting caseloads, the Social Security disability adjudication process has been affected by dramatic increases in the percentage of claimants represented by counsel over the last thirty years. According to the SSAB, the percentage of claimants who are represented by counsel has nearly doubled since 1977, when the percentage was approximately 36 percent.[19] It then began a rather rapid rise, reaching 48 percent in 1980[20] and 65 percent by fiscal year 1986.[21] It now is around 70 percent, with 18 percent of claimants assisted by non-attorney representatives. There is, however, a substantial difference in rate of representation for Disability Insurance ("DI") claimants, as compared to Supplemental Security Income ("SSI") claimants.[22] As a practical matter, it is unusual for a DI

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17 *See generally* GUIDE TO MEDICARE COVERAGE DECISION-MAKING AND APPEALS (Eleanor D. Kinney, ed. 2002) (Section of Administrative Law and Regulatory Practice, American Bar Association 2002). The question whether these adjudications will be heard by ALJs at SSA or at the Department of Health and Human Services ("HHS") is a matter of current controversy. *See Non-ALJs in Medicare Hearings: A View of SSA's Future?*, NOSSCR SOC. SEC. FORUM. Vol. 25, No. 3 (March 2003). In April 2003, a committee of the House of Representatives reported a bill that would effectuate a transfer of Medicare adjudications from SSA to HHS. *See* H.R. 810, Medicare Regulatory and Contracting Reform Act of 2003, §403, 107th Cong. 1st Sess. The ABA House of Delegates has recently adopted a recommendation urging, among other things, that beneficiaries continue to have the right to an ALJ hearing. Interestingly, the recommendation urges that "[n]either [HHS], nor its contractors, should be a party to the ALJ hearing." It also urges that: "[t]he record should not be closed prior to the hearing. After the ALJ hearing, beneficiaries should be provided the opportunity to reopen the record for good cause." Adopted August, 2003 (quotation taken from proposed recommendation, a telephone interview with Nancy Coleman, Executive Director of ABA Commission on Law and Aging confirmed that the language was unchanged). While the ABA recommendation is not inconsistent with the conclusions of this article pertaining to Social Security disability cases, it does not address the central emphasis of this article—improving the record for decision. We express no opinion on these issues with respect to Medicare claims adjudications.

18 *See* KEY WORKLOAD INDICATORS, *supra* note 16, at 5.

19 *See* SOCIAL SECURITY ADVISORY BOARD, DISABILITY DECISION MAKING: DATA AND MATERIALS 73 (Jan. 2001).

20 *See* HHS, Operational Report of the Office of Hearings and Appeals 25 (Sept. 30, 1986) (reporting that 48% of claimants were represented by counsel and 15% by non-attorneys).

21 *See id.* The corresponding figure for non-attorneys was 18%.

22 SSI claimants are represented by attorneys in 45.9% of claims; the rate for DI claimants is 74.9%. These figures are attributed to SSA by the Federal Bar Association, Letter from Hon. Kathleen McGraw, Chair, Social Security Section, Federal Bar Association to Hon. Clay Shaw, Jr., Chairman, Subcommittee on Social Security, U.S. House of Representatives 2 (Jan. 7, 2002) (regarding H.R. 3332, the "Attorney Fee Payment System Improvement Act of 2001"). However, this figure was for attorney representation, and no figure was given for mixed DI/SSI

claimant who wants representation to be unrepresented and relatively rare for SSI claimants as well.

This increase in claimant representation upsets the ALJ's "three hat role" and has a bearing on whether the government should also be represented at some point during the administrative appeals process. It also renews questions about whether the administrative record should be closed at a pre-ordained time (and, if so, when?).

A. *Related Social Security Advisory Board Studies*

The SSAB has already made general recommendations on the two topics discussed in this article. In its 2001 report, *Charting the Future of Social Security's Disability System: The Need for Fundamental Change*, the Board explained its reasoning for suggesting that the agency be represented at the hearing as follows:

> First, the fact that most claimants are now represented by an attorney reinforces the proposition, which has been made several times in the past, that the agency should be represented as well.
>
> Unlike a traditional court setting, only one side is now represented at Social Security's ALJ hearings. We think that having an individual present at the hearing to defend the agency's position would help to clarify the issues and introduce greater consistency and accountability into the adjudicative system. It would also help to carry out an effective cross-examination of the claimant. Many ALJs have told us that they are sometimes reluctant to conduct the kind of cross-examination they believe should be made because, upon appeal, the record may make them appear to have been biased against the claimant. Consideration should also be given to allowing the individual who represents the agency at the hearing to file an appeal of the ALJ decision.
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> If the agency is represented at the hearing there are issues that would have to be addressed, for example, who would have the responsibility for performing that function. Whoever had the responsibility would need substantially increased resources, at least in the short run. However, if government representation resulted in better-reasoned and justified decisions at the front end of the process, as many believe would be the case, then over time the number of appeals should go down, with savings to both the system and to claimants. The problem of representation for claimants who do not have it would also have to be addressed, but this is an issue that with a good faith effort should be able to be worked out.
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> Close the record after the ALJ hearing.—Second, Congress and

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cases. Nevertheless it seems clear that pure SSI cases are far less attractive for attorneys.

> SSA should review again the issue of whether the record should be fully closed after the ALJ decision. Following legislation in 1980, SSA issued a regulation that bars the submission of new evidence that pertains to a period after the ALJ hearing decision, but allows new evidence to be submitted if it relates to the period on or before the date of the decision.[23]
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> Leaving the record open means that the case can change at each level of appeal, requiring a *de novo* decision based on a different record. SSA has no data on the percentage of cases that are remanded back to ALJs that involve new evidence, but many ALJs have told us that in their observation it is more than half and that it adds substantially to their workload. They argue that leaving the record open provides an incentive for claimants' representatives to withhold evidence in order to strengthen an appeal at a later stage. They also believe that it gives representatives an incentive to prolong the case in order to increase their fees. Other ALJs do not believe that representatives hold back evidence for these reasons. If evidence is held back, they maintain, it is because the rules for presenting evidence are lax and representatives do not take the time or spend the money to obtain additional evidence unless required to do so as a result of an unfavorable hearing decision.
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> Closing the record would heighten the need to develop the record as fully as possible before the decision is made in order to ensure that claimants are not unfairly penalized. Closing the record would not preclude filing a new application.[24]

The following year, the General Accounting Office ("GAO") reacted favorably to the SSAB report by recommending that SSA "consider[] . . . some of the fundamental, structural problems as identified by the Social Security Advisory Board."[25]

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[23] SOCIAL SECURITY ADVISORY BOARD, CHARTING THE FUTURE OF SOCIAL SECURITY'S DISABILITY SYSTEM: THE NEED FOR FUNDAMENTAL CHANGE 19-21 (Jan. 2001), *available at* http://www.ssab.gov/disabilitywhitepap.pdf. *See also Hearing on Social Security Disability Programs' Challenges and Opportunities: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 107th Cong. (2002) [hereinafter Statement of the Hon. Hal Daub Chairman] (statement of the Hon. Hal Daub Chairman, Social Security Advisory Board, and former Member of Congress) (reiterating the recommendation on "having an individual present at the hearing to defend the agency's position").

[24] SOCIAL SECURITY ADVISORY BOARD, CHARTING THE FUTURE OF SOCIAL SECURITY'S DISABILITY SYSTEM: THE NEED FOR FUNDAMENTAL CHANGE, *supra* note 23, at 20-21. *See also* Statement of the Hon. Hal Daub Chairman, *supra* note 23 (reiterating the recommendation on closing of the record).

[25] United States General Accounting Office, *Social Security Disability Disappointing Results From SSA's Efforts to Improve the Disability Claims Process Warrant Immediate Attention* Report to the Chairman, Subcommittee on Social Security, Committee on Ways and Means, House of Representatives, 29 (Feb. 2002), *available at* http://www.gao.gov/new.items/d02322.pdf [hereinafter *GAO Report—Disappointing Results*].

B. *Other Relevant Studies (Administrative Conference of the United States)*

The former Administrative Conference of the United States ("ACUS") undertook numerous studies relating to the appeals process in the Social Security disability program and issued several recommendations specifically involving the various levels of review.[26] In 1978, ACUS issued a recommendation that addressed primarily the administrative hearing stage of the disability benefit claim processing and appeals process.[27] It reaffirmed the need for continued use of ALJs, but it also made suggestions concerning the development of the evidentiary hearing record. Those suggestions included recommendations that ALJs take more care in questioning claimants, seek to collect as much evidence prior to the hearing as possible, make greater use of prehearing interviews, and make better use of treating physicians as sources of information. Of most relevance to the present study, ACUS also recommended closing of the record at the ALJ stage, before review by the SSA Appeals Council.[28] In a 1990 supplementary recommendation, ACUS addressed the need to have the evidentiary record be as complete as possible, as early in the process as possible.[29] That recommendation advocated an increased use of subpoenas to make this possible and, in conjunction with a provision in an earlier recommendation, advocated the adequate compensation of physicians

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[26] *See* Recommendations of the Administrative Conference of the United States, *available at* http://www.law.fsu.edu/library/admin/acus/acustoc.html (detailing these recommendations). Professor Verkuil was a member of ACUS, Professor Lubbers was ACUS's Research Director from 1982-95, and Professor Bloch served as a consultant to ACUS on two research projects. ACUS's operations ceased in October 1995. *See also* Symposium, *Administrative Conf. of the United States ("ACUS")*, 30 ARIZ. ST. L.J. 1-204 (1998).

[27] Procedures for Determining Social Security Disability Claims, 43 Fed. Reg. 27, 508 (June 26, 1978). This recommendation was based largely on JERRY L. MASHAW, CHARLES L. GOETZ, FRANK I. GOODMAN, WARREN F. SCHWARTZ, PAUL R. VERKUIL & MILTON M. CARROW, SOCIAL SECURITY HEARINGS AND APPEALS (Lexington 1978). This study was done through the National Center for Administration Justice, Milton Carrow, Director, and was led by Professor Mashaw of the Yale Law School.

[28] *See* Procedures for Determining Social Security Disability Claims, 43 Fed. Reg. 27,508 ¶ C(1) (June 26, 1978) ¶ C(1), stating the following:

> The Appeals Council should exercise review on the basis of the evidence established in the record before the administrative law judge. If a claimant wishes to offer new evidence after the hearing record has been closed, petition should be made to the administrative law judge to reopen the record. Where new evidence is offered when an appeal is pending in the Appeals Council, the Appeals Council should make that evidence a part of the record for purposes of the appeal only if a refusal to do so would result in substantial injustice or unreasonable delay.

Id.

[29] Social Security Disability Program Appeals Process: Supplementary Recommendation, 55 Fed. Reg. 34, 213 (Aug. 22, 1990).

asked to provide medical information in disability proceedings.[30] ACUS also reiterated, in 1990, that the record before the ALJ should be closed at a set time after the hearing and set forth a specific recommended procedure.[31]

C. *Related Social Security Administration Initiatives*

In October 1982, the SSA began an "Adjudicatory Improvement Project" ("AIP") at the Office of Hearings and Appeals ("OHA"). As discussed more fully in Part IV, a centerpiece of this project was the SSA's government representation experiment, known as the Social Security Administration Representation Project ("SSARP"), which lasted until a district court injunction was issued against the project in 1986. SSA decided not to appeal the decision, and revoked the

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[30] *See* Improved Use of Medical Personnel in Social Security Disability Determinations, ¶ 5(c), *available at* www.law.fsu.edu/library/admin/acus/3058910.html, *discussed in* 55 Fed. Reg. 34,212 (Aug. 22, 1990). This recommendation also urged enhanced use of medical personnel at the initial decision level, better identification of conflicts over medical evidence, and heavier reliance on medical experts at the ALJ stage. It also suggested that if these reforms were instituted, the initial determination level should be a single step—with the elimination of the separate reconsideration stage.

[31] *See* Social Security Disability Program Appeals Process: Supplementary Recommendation, 55 Fed. Reg. 34, 213 at ¶¶ 4-5 (Aug. 22, 1990), describing the procedure as follows:

> 4. *Closing of the Administrative Record:* The administrative hearing record should be closed at a set time after the evidentiary hearing. Prior to this, the ALJ should set forth for the claimant what information the claimant needs to produce to complete the record, issue any necessary subpoenas, and provide the claimant adequate time to acquire the information. Requests for extension should be granted for good cause, including difficulty in obtaining material evidence from third parties. The ALJ should retain the discretion to accept and consider pertinent information received after closure of the record and before the decision is issued.
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> 5. *Introduction of New Evidence After the ALJ Decision:*
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> a. Upon petition filed by a claimant within one year of the ALJ decision or while appeal is pending at the Appeals Council, the ALJ (preferably the one who originally heard the case if he or she is promptly available) should reopen the record and reconsider the decision on a showing of new and material evidence that relates to the period covered by the previous decision. An ALJ's denial of such a petition should be appealable to the Appeals Council.
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> b. Appeals Council review of an ALJ's initial decision should be limited to the evidence of record compiled before the ALJ. Where the claimant seeks review of an ALJ's refusal to reopen the record for the submission of new and material evidence, the Appeals Council should remand the case of the ALJ (preferably the one who originally heard the case if he or she is promptly available), if it finds that the ALJ improperly declined to reopen the record. The Appeals Council should not review the merits itself or issue a decision considering the new evidence, unless remand would result in substantial injustice or unreasonable delay.

Id. In a footnote, the Conference noted that "Congress may at some time in the future need to consider whether it may want to provide for judicial review of Appeals Council determinations not to reopen the record." *Id.* at n.2.

regulations governing the SSARP in May of 1987.[32]

A more substantive project known as the Process Unification Initiative was begun in 1996. As described by SSA in 1997, the aim of "Process Unification" was to foster use of the same adjudicative standards by disability adjudicators at all levels of adjudication. More specifically, the agency attempted to: (1) define the specific weight to be given to DDS medical consultant opinions in hearing decisions; (2) clarify the guidelines in its regulations used in determining whether an individual lacks the capacity to perform less than a full range of sedentary work; and (3) provide for pre-effectuation review of hearing-level decisions made by OHA. Favorable decisions that appeared to be unsupported by the evidence of record were to be forwarded to the OHA Appeals Council for review.[33] A recent assessment of the initiative by the Federal Bar Association concluded that it was not accomplishing its purpose.[34]

Another set of four procedural projects designed to improve the disability decisionmaking process was started by SSA in 1994. A 2001 report by the GAO summarized those projects and concluded that although SSA had spent more than $39 million over seven years on the various initiatives, the results had "in general been disappointing."[35]

Two of the projects, the Disability Claim Manager and the Prototype, attempted to improve the initial claims process. The Disability Claim Manager initiative created a new position intended to perform the duties of both SSA field office claims representatives and state Disability Determination Service ("DDS") disability examiners. These managers were responsible for processing all aspects of a claim for disability benefits, both medical and nonmedical, and were expected to explain relevant program requirements and the disability adjudication process to claimants and to serve as the claimants' primary point of contact on their claims. The Prototype initiative attempted to ensure that all legitimate claims were approved as early in the process as possible. It required disability examiners to document and explain the

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[32] *See infra* notes 194-96 and accompanying text.

[33] *See* SSA Statement of Statement of Regulatory and Deregulatory Priorities, Unified Agenda of Regulatory and Deregulatory Actions (October 1997), *available at* http://ciir.cs.umass.edu/ua/October1997/priority/pfile-23.html.

[34] *See Oral Statement: Before Subcomm. on Social Security of the U.S. House of Representatives* (2002) (oral statement of Hon. Kathleen McGraw, Chair, Social Security Section, Federal Bar Association), stating as follows:

> SSA's process unification initiative was intended to have everyone using the same legal standards to decide the issue of disability. That still is not happening. At the DDS, decisions are driven solely by the objective medical findings, with mere lip service paid to the requirements of the law that claimants' subjective complaints such as pain and fatigue be assessed.

Id.

[35] *GAO Report—Disappointing Results, supra* note 25, at 1-2.

basis for their decisions more thoroughly and it gave them greater decisional authority for certain claims. It also eliminated reconsideration of denials at the DDS level. The SSA has extended the Prototype a number of times; most recently, it announced that the Prototype would be continued at least through June 30, 2003 in order to test various initiatives further, including the elimination of the reconsideration level of review.[36]

The other two initiatives—Hearings Process Improvement ("HPI") and Appeals Council Process Improvement—were aimed at changing the processes for handling appeals of claims denied by the DDS after initial decision and reconsideration. Both initiatives were designed to speed-up decisions made by ALJs and by the Appeals Council, and thereby to reduce their backlogs of appealed claims. HPI attempted to reduce the time it takes to get a decision on an appealed claim by increasing the amount of analysis and screening done on a case before it is scheduled for a hearing with an ALJ. In addition, the initiative reorganized hearing office staff into small groups, called "processing groups," to try to attain more accountability and control in the handling of each claim.

The GAO reported that the results of the four initiatives were mixed. In the Disability Claim Manager Initiative, which ran from November 1999 to June 2001 at thirty-six locations in fifteen states, claims were processed faster and customer and employee satisfaction improved, but administrative costs were substantially higher. SSA's own evaluation of the test concluded that the overall results were not compelling enough to warrant additional testing or wide implementation. In the "Prototype," which was implemented in ten states in October 1999, preliminary results did show that the DDSs operating under the Prototype are awarding a higher percentage of claims at the initial decision level, while the overall accuracy of their decisions is comparable with the accuracy of decisions made under the traditional process. Moreover, appeals from denied claims in this process reach a hearing office about seventy days faster than under the traditional process because the Prototype eliminates the reconsideration step in the appeals process. However, this was offset by an increase in the rate of appeals, thus increasing backlogs. As a result, the SSA decided in December 2001 that it would not extend the Prototype to additional states in its current form. According to GAO, SSA plans to reexamine the Prototype to determine what revisions are necessary to decrease overall processing time and to reduce its impact on costs before proceeding further.

The Hearings Process Improvement Initiative was implemented

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[36] *See* 67 Fed. Reg. 75, 895 (Dec. 10, 2002).

nationwide in 2000. Unfortunately, according to the GAO, it has slowed processing in hearings offices from 318 days to 336 days. And finally, the Appeals Council Process Improvement Initiative was implemented in fiscal year 2000 and has resulted in some improvements. The time required to process a case in the Appeals Council has been reduced by 11 days to 447 days and the backlog of cases pending review has been reduced from 144,500 (fiscal year 1999) to 95,400 (fiscal year 2001). GAO concluded that "[l]arger improvements in processing times were limited by, among other things, automation problems and policy changes."[37]

As found by GAO, the results of the HPI initiative have been to add 18 days to the time required for a decision in an appealed claim.[38] It is not surprising, therefore, that the number of appealed Social Security cases that were processed has decreased since the initiative's implementation. In fiscal year 1999, 524,738 cases were decided; in fiscal year 2001, this number had decreased 24.6 percent to 395,565 cases. This led to a backlog in cases pending a decision from 264,978 cases in September 1999 to 392,387 in September 2001. This increase of 48.1 percent far exceeded the 5.7 percent rise in cases received by hearing offices during the same period.[39] Fiscal Year 2002 figures show that dispositions have increased again to 454,718, but the pending caseload has jumped by over 70,000 to 463,052.[40]

GAO attributed this failure of the HPI initiative to an attempt to implement these large-scale changes too quickly. This led to delays, poorly timed and insufficient staff training, and the absence of important automated functions. Specifically, there was a problem with the slowing of the organization of case evidence (referred to as "case pulling"), which reduced the number of case files ready for ALJ review. This case-pulling backlog was due to personnel changes that were a result of the initiative. These changes created a void of experienced staff to organize and prepare case files for ALJ review.[41] Another problem identified by GAO was "poorly timed and insufficient staff training" of the 2000 individuals assigned new responsibilities under the HPI.[42] Finally, problems encountered during the initiative's implementation were exacerbated by the fact that the automated functions necessary to support initiative changes never materialized.[43]

GAO reported also that there was only mixed support for the

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37 *GAO Report—Disappointing Results, supra* note 25, at 3-4.

38 *See id.* at 20.

39 *See* KEY WORKLOAD INDICATORS, *supra* note 16, at 5. Note that these figures differ from GAO's because GAO includes Medicare cases.

40 *See id.*

41 *GAO Report—Disappointing Results, supra* note 25, at 21.

42 *Id.*

43 *See id.* at 22.

initiative among ALJs.[44] Many ALJs indicated that the ALJ union was organized in 1999 in response to the perception that SSA excluded them in the formation of the HPI initiative. However, SSA officials disagreed with this assertion and said that ALJs were included during the formation of the initiative.[45]

Finally, the difficulties SSA is experiencing under the HPI initiative may also have been made worse by a freeze on ALJ hiring. Since April 1999, this hiring freeze has prevented SSA from hiring new ALJs to replace those who have retired. However, the hiring freeze was temporarily lifted in September 2001, thereby allowing SSA to hire 126 ALJs.[46] At this writing, an appellate court has just reversed the administrative decision that led to this hiring freeze, but it is unclear how and when the hiring of ALJs by SSA will be reopened.[47]

SSA also introduced the Senior Attorney Program, a temporary initiative in fiscal year 1995 to reduce OHA's backlog of appealed cases. Under this program, which was phased out in 2000, selected attorneys reviewed pending claims in order to identify those cases in which the evidence already in the case file supported a fully favorable decision. Senior Attorneys had the authority to approve those claims without ALJ involvement. During its existence, the program succeeded in reducing the backlog of pending disability cases at the hearing level by issuing some 200,000 hearing-level decisions. However, GAO reported that studies differed on the accuracy and quality of Senior Attorney decisions.[48] Moreover, "SSA management has expressed concern that the Senior Attorney program [was] a poor allocation of resources as it divert[ed] attorneys from processing more difficult cases in order to process the easier cases."[49] One GAO interviewee acknowledged that the program moved cases but raised questions about the quality of the determinations, suggesting that some Senior Attorneys

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[44] *See id.*

[45] *See id.*

[46] *See id.*

[47] On February 20, 2003, the Court of Appeals for the Federal Circuit reversed a decision by the MSPB in which the Board concluded that the scoring formula used by the Office of Personnel Management ("OPM") in 1996 to evaluate candidates for the position of ALJ violated OPM's regulations and the Veterans' Preference Act because it gave too much weight to veterans' preferences. The MSPB Chief Administrative Law Judge initial decision in *Azdell v. OPM*, Docket No. DC-300A-97-0368-N-1, which ordered OPM to discontinue use of its 1996 scoring formula for the ALJ examination, led OPM on April 22, 1999 to suspend the ALJ examination and stop processing all pending ALJ applications. On October 20, 2000, in response to cross-appeals, the Board ordered OPM to "reconstruct the ALJ registers and all certificates of eligibles that were issued while the 1996 scoring formula was in effect." Azdell v. Office of Pers. Mgmt., 87 M.S.P.R. 133-61 (2000), *reconsideration denied*, 89 M.S.P.R. 88 (2001). This is the decision that was reversed by the Court of Appeals for the Federal Circuit in *Meeker v. Merit Sys. Protection Bd.*, 319 F.3d 1368 (Fed. Cir. 2003), *reh'g en banc denied* (July 3, 2003).

[48] *See GAO Report—Disappointing Results, supra* note 25, at 23.

[49] *See id.* at 23-4.

approved questionable cases to justify their role. Another said the quality was variable but that in his experience Senior Attorneys failed to develop the cases they did not approve as they were supposed to do.

On the other hand, the National Treasury Employees Union ("NTEU") has advocated a retention and expansion of the Senior Attorney Program. It argues that:

> [I]t is unreasonable to expect an Administrative Law Judge to produce more than 500 dispositions in a year if an acceptable level of quality is to be maintained. If ALJs are the only decision-makers, unless the Agency is prepared to accept a much greater number of ALJs than currently are employed, the simple arithmetic mandates an ever increasing backlog and skyrocketing processing times. The solution is more decision makers.[50]

Its president has expressed the view that the Senior Attorney program was a "resounding success,"[51] noting the following statistics and conclusion:

> Senior Attorneys issued approximately 220,000 decisions during the course of the Program. The average processing time for Senior Attorney decisions was approximately 105 days. During its pendency the OHA backlog fell from over 550,000 to as low as 311,000 at the end of FY 1999. The correlation is obvious.[52]

According to the NTEU, in July 1998, the Senior Attorney Program was significantly downsized with approximately one-half of the senior attorneys returned to the GS-12 attorney adviser position:

> Unfortunately, the number of Senior Attorneys was not increased which led to a significant decline in the Program's productivity. This decrease in productivity led to the rise in unpulled cases and the beginning of the increase in the backlog and average processing time. . . . Had the Senior Attorney Program not been downsized, and then eliminated, there would be about 90,000 fewer cases waiting to be 'pulled.'[53]

The NTEU also rebutted the criticisms relating to decisional accuracy, and claimed that the Senior Attorneys were "experienced OHA Attorney Advisors who have many years experience dealing with the intricacies of the legal-medical aspects of the Social Security disability program."[54] The National Organization of Social Security Claimants' Representatives ("NOSSCR") expressed support for

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[50] *Hearing Series on Social Security Disability Programs' Challenges and Opportunities: Hearings Before the Subcomm. on Social Sececurity of the House Comm. on Ways and Means*, 107th Cong. (2002) (Statement of James A. Hill, President, Attorney-Advisor, Office of Hearings and Appeals, Social Security Administration, Cleveland Heights, Ohio, and President, National Treasury Employees Union, Chapter 224).

[51] *Id.* at 6.

[52] *Id.* at 5.

[53] *Id.* at 5-6.

[54] *Id.* at 6.

reinstating the Senior Attorney Program in a recent position paper on improving the disability determination process, noting that the program "was well received by claimants' advocates because it presented an opportunity to present a case and obtain a favorable result efficiently and promptly."[55] In that paper, NOSSCR observed more generally:

> We support reinstating senior attorney authority to issue decisions in cases that do not require a hearing and expanding ways that they can assist ALJs. For instance, they also can provide a point person for representatives to contact for narrowing the issues, pointing out complicated issues, or holding prehearing conferences.[56]

More recently, the SSA has taken additional steps to reduce backlogs and to streamline the hearings process, subject to negotiation with union officials. These include creating a law clerk position for ALJs, allowing ALJs to issue decisions from the bench immediately after a hearing, and including them in the early screening of cases for immediate allowances.[57] SSA announced a new set of proposed reforms, also aimed in part in reducing the time for processing appeals, in September 2003.[58]

II. DISABILITY DETERMINATION PROCESS

This part begins with a brief analysis of the statutory disability standard, including a description of how the Social Security Administration implements that standard, and then describes disability claim processing and the administrative appeals process in some detail.

A. *The Statutory Disability Standard*

The Social Security Act defines "disability" for purposes of DI and SSI claims as the "inability 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 twelve

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[55] National Organization of Social Security Claimants' Representatives, Position Paper: Improving the Disability Determination Process While Protecting Claimants' Rights 6-7 (Nov. 2002), *available at* http://www.nosscr.org/dibpaper.html.

[56] *Id.* at 7.

[57] *See Hearings on Challenges Facing the New Commissioner of Social Security: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 107th Cong. (2002) (statement of Jo Anne B. Barnhart, Commissioner, Social Security Administration).

[58] *See supra* note 5.

months."[59] The disability standard for SSI claims has slightly different introductory language, so that the standard is phrased in terms of an individual who is "unable to engage in substantial gainful activity."[60] However, the substance of the two standards is the same and they are interpreted consistently as being essentially identical.[61] This standard has three separate components: a severity requirement (the "inability to engage in any substantial gainful activity"); an origin requirement (the disability must be based on a "medically determinable physical or mental impairment"); and a duration requirement (qualifying impairment must last at least one year or be expected to result in death). Each of these requirements must be met; for example, a short-term disability, no matter how severe, is not sufficient to establish eligibility under the Act.

The severity requirement is defined further, so that an individual is disabled "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy."[62] In other words, the inability to perform work that one has done in the past is not sufficient; a claimant must be unable to do any other work in the national economy, taking into account his or her age, education, and prior work experience. Moreover, the issue is not the claimant's ability to obtain employment, so long as there are jobs in the national economy that he or she can perform. As stated in the Act, the ability to perform substantial gainful activity is to be determined "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."[63]

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59 42 U.S.C. § 423(d)(1)(A) (2003).

60 42 U.S.C. § 1382c(a)(3)(A) (1974). There is a different disability standard in the SSI program for children under the age of 18 that is not discussed separately in this report. Originally, the standard was "any medically determinable physical or mental impairment of comparable severity [to that of a disabled adult]." *See* 42 U.S.C. § 1382c (a)(3)(A). In 1996, following controversial litigation that culminated in *Sullivan v. Zebley*, 493 U.S. 521, 532 (1990), and equally controversial regulations implementing the Court's decision in *Zebley*, Congress amended the standard to its current language: "[a]n individual under the age of 18 shall be considered disabled . . . if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations." 42 U.S.C. § 1382c(a)(3)(C)(i) (2000).

61 *See, e.g.*, Bowen v. Yuckert, 482 U.S. 137, 140 (1987) (stating that both titles of the Social Security Act define "disability" as the inability to engage in substantial gainful activity); Perez v. Chater, 77 F.3d 41, 46 (2d Cir. 1996).

62 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B) (2003).

63 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B) (2003). The phrase "work which exists in the national economy" is defined further as "work which exists in significant numbers either in the region where [the claimant] lives or in several regions of the country." *Id.*

1. "Sequential Evaluation Process"

SSA uses a five-step "sequential evaluation process" to determine if a claimant is disabled.[64] This evaluation process is used for all DI claims, and for all adult claims under the SSI program. A somewhat different process—effectively, a truncated version of the regular process—is used for claims by children for SSI benefits.[65]

The sequential evaluation process is used throughout the administrative process, including appeals, and is fully accepted by the courts as the framework for analysis of a Social Security disability claim.[66] It is designed to test a claimant's evidence of disability at different levels, each of which raise different factual and legal issues relative to a finding of disability. The process operates somewhat like a flow chart. At each level, depending on the facts, the claim is either resolved (depending on the level, either with a finding that the claimant is disabled or that the claimant is not disabled), or, if that finding cannot be made, then the process continues to the next step. For evaluations that reach the fifth and final level, the process again dictates a conclusion whether the claimant is disabled or not, depending on the facts.

In effect, the sequential evaluation process asks a series of questions. The first question is whether the claimant is performing substantial gainful activity. If so, the claimant is considered "not disabled," regardless of his or her medical condition, and the process ends.[67] If the claimant is not currently engaging in substantial gainful activity, the process moves to the second question, which is whether the claimant has a "severe" impairment that significantly limits his or her ability to perform work. If not, the claimant is considered not disabled and the process ends there.[68] If the claimant does have a severe

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64 20 C.F.R. §§ 404.1520, 416.920 (2003). Earlier regulations had used the term "sequential evaluation process" to describe this procedure and that term is still widely used.

65 *See id.* § 416.926a (2003). *See also* 42 U.S.C. § 1382c(a)(3)(C)(i) (2003) (stating that the disability standard for children under the age of 18, a group eligible for disability benefits uniquely thorough the SSI program, is substantively different as well). Although this difference is highly significant relative to the ultimate decision on eligibility, the same basic disability determination process is followed and therefore a child's SSI claims will not be discussed separately here.

66 As one court stated, "[i]t is important for the [administrative law judge] to follow the orderly framework set out in the [sequential evaluation regulations] to ensure uniformity and regularity in outcome as well as fairness to the claimant." Mitchell v. Schweiker, 551 F. Supp. 1084, 1087-88 (W.D. Mo. 1982).

67 *See* 20 C.F.R. §§ 404.1520(b), 416.920(b) ("If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.").

68 *See* 20 C.F.R. §§ 404.1520(c), 416.920(c) ("If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic

impairment, the evaluation process continues on to a third question, which asks whether the claimant's medical condition meets or equals the requirements of SSA's Listing of Impairments. If so, the claimant is considered disabled and the process stops.[69] If the claimant's impairment does not meet the requirements of the Listing, the claim continues to a fourth question, which asks a medical-vocational question: Is the claimant prevented from performing his or her past relevant work? If not, the claimant is considered not disabled and, once again, the process stops.[70] If the claimant is prevented from performing past relevant work, the process reaches the final question, which addresses the ultimate medical-vocational standard for disability benefits: considering the claimant's age, education, and prior work experience: Can he or she perform other substantial gainful work that exists in significant numbers in the national economy? If such other work exists, the claimant is not disabled; if such work does not exist, then he or she is disabled.[71]

Generally, claimants have the burden of proof on the issue of disability.[72] However, neither the Social Security Act nor the Social Security regulations specify how the claimant's burden operates in the

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work activities, we will find that you do not have a severe impairment and are, therefore, not disabled."). A denial at Step 2 is warranted only for claimants "with slight abnormalities that do not significantly limit any 'basic work activity.'" Bowen v. Yuckert, 482 U.S. 137, 158 (1987) (O'Connor, J., concurring) (citing Soc. Sec. Rul. 85-28 (1985)). *See also* Chevalier v. Shalala, 874 F. Supp. 2, 5 (D.D.C. 1994) (citing same language and upholding denial benefits for failure to show a severe impairment).

69 *See* 20 C.F.R. §§ 404.1520(d), 416.920(d) ("If you have an impairment(s) which meets the duration requirement and is listed in [the Listing of Impairments] or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience."). *See also infra* note 74 (discussing the Listing of Impairments and the concept of "medical equivalence" to a listed impairment).

70 *See id.* §§ 404.1520(f), 416.920(f) (2003), stating the following:

> If we cannot make a determination or decision at the first three steps of the sequential evaluation process, we will compare our residual functional capacity assessment . . . with the physical and mental demands of your past relevant work. If you can still do this kind of work, we will find that you are not disabled.

Id. (citation omitted).

71 *See id.* §§ 404.1520(g)(1), 416.920(g)(1) (2003):

> If we find that you cannot do your past relevant work because you have a severe impairment(s) (or you do not have any past relevant work), we will consider [our] residual functional capacity assessment . . . together with your vocational factors (your age, education, and work experience) to determine if you can make an adjustment to other work. If you can make an adjustment to other work, we will find you not disabled. If you cannot, we will find you disabled.

Id. (citation omitted). A different rule is applied at this step for claimants who did only "arduous unskilled physical labor" for 35 years or more and with only a "marginal" education. 20 C.F.R. §§ 404.1520(g)(2), 416.920(g)(2) (2003). *See also id.* §§ 404.1562, 416.962 (2003).

72 *See* 20 C.F.R. §§ 404.1512(a), 416.912(a) (2003). *See also* 42 U.S.C. § 423(d)(5)(A) (2003) ("An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Commissioner of Social Security may require.").

context of the sequential evaluation process. Nonetheless, case law makes it clear that upon proof by a claimant that he or she cannot perform prior work, the burden shifts to SSA to prove that the claimant can perform other work available in the national economy.[73]

The first two steps are designed to identify the most obvious denials: claimants who are working and therefore are, by definition, not "unable to perform substantial gainful activity" (Step 1) and those with no impairments that significantly restrict their capacity to work (Step 2). The third step is designed to simplify decisionmaking for the most obviously eligible claimants: those with impairments that match (or equal) the strict criteria set forth in the Listing of Impairments (Step 3).[74] The last two steps take on the closer cases—those that cannot be resolved through the first three steps—and address the more complex medical-vocational aspects of the disability standard. Step 4 is still relatively focused: Claimants who can perform jobs that they held in the past—jobs that, by definition, are within their vocational competence—are denied benefits on that ground.[75] Only at Step 5 does the process deal with the open-ended, ultimate question of whether the claimant can perform any jobs at all, given his or her age, education, and work experience.

For claims that reach Steps 4 and 5, the claimant is assigned a residual functional capacity (often referred to as "RFC"), which represents the level of work, if any, the claimant has the capacity to perform.[76] Then, SSA decides whether, given the claimant's RFC, he or she can perform prior relevant work and, if not, whether, considering in addition his or her age, education, and prior work experience, a significant number of jobs exist in the national economy that the claimant can perform.

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73 *See, e.g.*, Bowen v. Yuckert, 482 U.S. at 146.

74 The Listing sets out physical and mental impairments that are "severe enough to prevent an adult from doing any gainful activity." 20 C.F.R. §§ 404.1525(a), 416.925(a). The claimant has the burden of proof in providing the medical findings necessary to show that his or her impairment meets a listing. *Id.* §§ 404.1512(a), 416.912(a). In order to show that an impairment (or combination of impairments) equal the requirements of the Listing, a claimant must present "medical findings . . . at least equal in severity and duration to the listed findings." *Id.* 404.1526(a), 416.926(a). *See* Soc. Sec. Rul. 96-6p (1996) (discussing the Administration's position on medical equivalence).

75 This analysis can be more complicated. The Supreme Court granted *certiorari* recently in a case where the court held that a claim could not be denied at Step 4 if the claimant's prior work no longer exists, in the face of a dissenting opinion—and most earlier precedent—that saw a claimant's prior work only as a standard for measuring work capacity. *See* Thomas v. Comm'r, 294 F.3d 568 (3d Cir. 2002), *cert. granted sub nom.* Barnhart v. Thomas, 537 U.S. 1187 (2003).

76 A claimant's RFC is based on his or her physical and mental limitations and measures how they affect the claimant's ability to work; it is an evaluation of "what [the claimant] can still do despite [those] limitations." 20 C.F.R. §§ 404.1545(a), 416.945(a) (2003). There are five levels of RFC: sedentary, light, medium, heavy, and very heavy work. *See id.* §§ 404.1567, 416.967 (2003); Soc. Sec. Rul. 96-8p (1996) (discussing the Administration's view on Residual Functional Capacity assessments).

2. The Medical-Vocational "Grid" Rules

Many claims are resolved at Step 5 through the use of a special set of rules and tables, known as the Medical-Vocational Guidelines.[77] The heart of the Guidelines is the so-called "grids," which consist of three tables.[78] Based on data from various government publications,[79] each table has a set of "rules" consisting of three columns that account for a claimant's age, education, and previous work experience, and a fourth column that directs a decision of disabled or not disabled. Thus, provided a claimant's vocational factors and residual functional capacity coincide with all of the criteria of a particular rule, that rule directs a conclusion that the claimant is or is not disabled. For example, if a claimant is limited to light work, is closely approaching advanced age (defined as between the ages of fifty and fifty-four), is illiterate, and has either no previous work experience or previous work experience limited to unskilled labor, the grids would direct a finding that the claimant is disabled.[80] On the other hand, if that same claimant were at least literate, then the grids would direct a finding that the claimant is not disabled.[81]

The Supreme Court upheld the Guidelines in 1983 as valid rules for determining disability.[82] The Court made it clear, however, that the Guidelines' grids can be used to determine disability only where the claimant's particular circumstances match each of the component parts of the particular rule.[83] When a claimant's RFC or relevant vocational factors are different from those reflected in a particular grid rule, the Guidelines cannot be used to meet the Administration's burden of proof.[84] In such cases, there must be proof that specific jobs exist in significant numbers in the national economy that the claimant can

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77 *See* 20 C.F.R. Part 404 Subpart P App. 2 (2003).

78 A claimant's RFC determines which table of the Medical-Vocational Guidelines is to be used: Table 1 applies to individuals whose RFC limits them to sedentary work; Table 2 to those limited to light work; and Table 3 to those limited to medium work. No tables exist for individuals still able to perform heavy or very heavy work because the Guidelines state, in effect, that regardless of their age, education, or work experience, sufficient jobs exist in the national economy for such individuals to pursue substantial gainful activity. On the other hand, if it is found that an individual is unable to perform work at even a sedentary level, he or she will be assumed to be disabled, absent specific evidence to the contrary.

79 These include, most notably, the Dictionary of Occupational Titles and the Occupation Outlook Handbook, both published by the Department of Labor. *See* 20 C.F.R. Part 404 Subpart P App. 2 § 200.00(b) (2003).

80 *See* 20 C.F.R. Part 404 Subpart P App. 2 § 202.09 (2003).

81 *See id.* Part 404 Subpart P App. 2 § 202.10 (2003).

82 *See* Heckler v. Campbell, 461 U.S. 458 (1983).

83 *See id.* at 462 n.5.

84 This policy is reflected in the Guidelines themselves. *See* 20 C.F.R. Part 404 Subpart P App. 2 § 200.00(a) (2003).

perform, given his or her impairments, age, education, and prior work experience. Typically, this proof comes from a vocational expert, either in a written report or, at the administrative hearing level, through live testimony.

3. Other Special Rules

Apart from the sequential evaluation process and the Medical-Vocational Guidelines, there are a number of special rules governing medical evidence and how that evidence should be weighed in making disability decisions. The most important of these rules are noted here because they can have a significant impact on the disability determination process. For example, SSA regulations provide that a treating physician's opinion concerning the nature and severity of a claimant's medical condition must be given "controlling" weight if the opinion "is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record."[85] If not given controlling weight, the opinion may still be entitled to special weight according to a series of factors, including some that focus on the treating relationship and others that are directed more generally at all medical sources.[86] Regulations also provide that SSA may arrange for a consultative examination if it is unable to obtain enough current medical information from the claimant's medical sources to decide the claim. These regulations include detailed provisions that outline when a consultative examination can be purchased and when a treating physician should be used to conduct the examination.[87]

B. *Disability Claim Processing and Appeals*

Determining disability is but one component of an eligibility decision on an application for benefits. Depending on the type of benefit involved, various criteria unrelated to disability and common to non-disability benefit claims (age, insured status, income and resources, etc.) must be documented and evaluated before a final eligibility decision is made. At the same time, SSA must, and does, process claims for disability benefits differently than it does claims for other types of benefits. This is the case, for example, at the very beginning of the process: all claims for DI or SSI benefits start with an application form that calls for general information intended to indicate what type of

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[85] *Id.* §§ 404.1527(d)(2), 416.927(d)(2) (2003).

[86] *See id.* §§ 404.1527(d)(2)-(6), 416.927(d)(2)-(6) (2003).

[87] *See id.* §§ 404.1519a, 404.1519b, 404.1519h, 416.919a, 416.919b, 416.919h (2003).

benefits for which the claimant is most likely to be eligible. Although the initial application form asks for some information specifically relevant to disability claims that may lead to a decision on eligibility,[88] a separate form, known as the "disability report," is added to the file once the issue of disability surfaces. Similar accommodations to the special needs of disability determinations are found throughout the application and appeals process, most notably with respect to the gathering of expert medical and vocational evidence.

The current Social Security decisionmaking process is complex, in part because of the large numbers of claims and appeals, but also because the vast majority of disputed claims involve disability determinations. Deciding whether any one claimant is unable to engage in "substantial gainful activity" in light of not only his or her physical and mental impairments, but also any effects of age, education, and prior work experience, can be difficult. Making disability determinations fairly and accurately for millions of claims (and in hundreds of thousands of appeals) is a daunting task. Some of the work is facilitated by the disability regulations discussed above; the "sequential evaluation process" and its components, including the Listing of Impairments and the Medical-Vocational Guidelines, provide important structure. The rest is left to the administrative process.

There are four levels of administrative decisionmaking for Social Security claims—and for most claims, they must pass through each before a decision is subject to judicial review.[89] The process begins at local Social Security Administration offices, but the all-important disability decisions are then contracted out to state-run DDS. SSA, together with the DDSs for disability claims, makes the initial decision on an application and the initial decision to terminate benefits; in case of appeal, SSA and DDS also handle the first level of review, known as "reconsideration." Further administrative appeals are handled by SSA, but through the Office of Hearings and Appeals, which houses the Office of the Chief Administrative Law Judge who oversees

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[88] Information obtained on the initial form is used to determine the nature of the claimant's physical and mental impairments, the date of onset of the alleged disability, and whether the claimant performed any work after the alleged date of onset. If the claimant performed any work after the onset date and that work is determined to be substantial gainful activity and is continuing, the claim can be denied at the local office without having to evaluate the alleged disability. *See id.* §§404.1520(b), 416.920(b) (2003) ("If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.").

[89] *See, e.g.*, Johnson v. Shalala, 2 F.3d 918, 920 (9th Cir. 1993) (stating that the Social Security Act, 42 U.S.C. § 405(g), "requires each Social Security claimant to exhaust his administrative remedies before appealing to a federal district court"). There are special rules for expedited appeals where the only issue is the constitutionality of an applicable provision of the Social Security Act. *See also* 20 C.F.R. §§ 404.923- 404.928, 416.1423- 416.1428 (2003).

approximately 1100 ALJs[90] who are responsible for administrative hearings; and the Appeals Council (with a chair and twenty-eight "Administrative Appeals Judges"),[91] which reviews administrative hearing decisions on appeal by a claimant or on its own initiative.

1. Initial Decision on Application or Termination of Benefits

A claim for DI or SSI benefits must begin with an application filed with the Social Security Administration.[92] Most applications are filed in person or by telephone; however, the Administration also allows applications to be filed on-line via the Internet.[93] Most Social Security Administration offices have "specialists" who assist claimants with the application process and make sure that the applications are complete. However, the most important work on a disability claim—determining whether the claimant is disabled—is done at the state DDS.

When a claim is received by DDS, it is assigned to a disability examiner who works together with a medical consultant to determine whether the claimant is disabled and, if so, the date the disability began (or, in termination cases, the date the disability ended). Disability examiners do most of the evaluation; however, they must consult with the medical consultant on medical equivalence and RFC.[94]

Although disability evaluations are made by the state DDS, the final decision on eligibility for benefits is made at the local Social Security Administration office.[95] DDS's disability assessment is followed in virtually all cases, but certain administrative findings are identified as specially "reserved" to the Commissioner of Social Security, including whether an impairment meets or equals a listing in the Listing of Impairments and the claimant's RFC.[96] Moreover, SSA reviews a certain percentage of claims before any action is taken to implement the eligibility decision.[97] If approval is recommended, the

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90 *See* KEY WORKLOAD INDICATORS, *supra* note 16, at 1 (providing the latest figures which show 1082 ALJs on duty).

91 The number comes from a listing in the FEDERAL YELLOW BOOK III-343 (Leadership Directories, Inc., Summer 2003). These judges are not ALJs and lack the statutory independence and APA protection enjoyed by ALJs.

92 *See* 20 C.F.R. §§ 404.610, 416.310 (2003).

93 This practice began in 2002. *See* https://s00dace.ssa.gov/pro/isba3/wwwrmain.shtml (Social Security Online: Social Security Benefit Application) (last visited Oct. 27, 2003).

94 *See* 20 C.F.R. §§ 404.1526(b), 404.1546; 416.926(b), 404.946 (2003).

95 Technically, the Disability Determination Section's decision is a recommended decision that need not be followed by the Administration. *See* 20 C.F.R. §§ 404.1503(d), 416.903(d) (2003).

96 *See* 20 C.F.R. §§ 404.1527(e), 416.927(e) (2003).

97 *See* 42 U.S.C. § 421(c)(1) (2003). Decisions not reviewed are implemented as recommended by the DDS; those reviewed are either approved for implementation or returned to the DDS for a new decision.

file is returned to the local SSA office for processing payment. If the decision is to deny the claim, SSA sends a notice explaining to the claimant why the claim was denied and that a request for reconsideration must be filed within sixty days of the denial.

2. Reconsideration

The first step in appealing an adverse decision is to request "reconsideration."[98] Reconsideration is an internal examination of all the evidence in the file at the time of the initial decision, together with any additional evidence submitted subsequent to the initial decision. Reconsideration takes place at the same DDS where the initial decision was made; however, the disability examiner and medical consultant who were involved in the initial determination cannot be involved at the reconsideration stage. Only about 16 percent of DDS decisions are reversed at reconsideration,[99] and all reconsideration reversals are reviewed at the appropriate Regional Office. Many reversals are based on new medical evidence submitted subsequent to the initial decision. Sometimes, claims that were denied because the duration requirement was not met are reversed on reconsideration simply because of the passage of time. A reversal may also result because of a better definition or progression of the claimant's disability.

For denials of initial applications, reconsideration consists of a review of the paper record, supplemented perhaps with additional evidence, but without any face-to-face contact between the claimant and the decisionmaker. There is, however, a separate reconsideration procedure in CDR cases where existing benefits are terminated upon a finding of nondisability based on medical factors.[100] For these cases, reconsideration includes a "disability hearing" held by a "disability hearing officer."[101]

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[98] *See* 20 C.F.R. §§ 404.909, 416.1409 (2003). It should be noted that Social Security Commissioner, Jo Anne Barnhart, has proposed eliminating the reconsideration step as part of effort to use DDS decision resources more effectively. Barnhart Statement, *supra* note 5.

[99] *See* SOCIAL SECURITY ADVISORY BOARD, DISABILITY DECISION MAKING: DATA AND MATERIALS 86 (Jan. 2001).

[100] *See* 20 C.F.R. §§ 404.914-18, 416.1414-18 (2003). *See generally* 42 U.S.C. §§ 405(b)(2), 1383(a)(7)(A) (2003).

[101] According to information provided by Mike Brennan of the SSAB staff, such hearings last about an hour and are conducted by non-ALJ adjudicators, chosen for their medical and vocational knowledge who have been sent to a training program offered by McGeorge School of Law.

3. Administrative Hearing

The next level of appeal is an administrative hearing before an ALJ. A claimant has sixty days from the date of receipt of a reconsideration notice to request an administrative hearing, unless the time limit is extended for good cause.[102] If the claimant requests a hearing, one will be held unless the ALJ decides to issue a fully favorable decision without a hearing, or to remand for further administrative action because the ALJ believes that a revised decision will be favorable to the claimant. The ALJ may also dismiss the appeal on certain specified grounds.[103]

The ALJ is the only decisionmaker in the entire application and appeals process that sees the claimant in person.[104] Before the hearing takes place, the ALJ decides whether the evidence in the file is adequate to resolve the issues or whether factual development of some type is necessary. The ALJ also decides what additional evidence is necessary, if any, and whether a vocational expert or medical expert should be called to appear at the hearing. As part of this process, the ALJ can order a consultative examination of the claimant through the DDS, and must do so if such an examination is necessary to complete the medical record.[105] The ALJ may also refer the case for prehearing proceedings.[106]

The hearing itself is informal and non-adversarial. Although the practice varies by hearing office, most SSA ALJs do not wear robes. Typically, the ALJ will ask a series of questions and then, if the claimant is represented, the claimant's representative will continue the questioning. Most hearings last approximately one hour; however, they can range from as little as thirty minutes to more than two hours. Typically, an ALJ will schedule about six hearings in a full day. Following the hearing, the ALJ must issue a formal written decision that includes a recitation of the evidence considered, findings of facts, and detailed reasons for the decision.[107]

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102 *See* 20 C.F.R. §§ 404.933(b), 416.1433(b) (2003).

103 *See id.* §§ 404.957, 416.1457 (2003).

104 An exception to this rule exists in certain cases where benefits were terminated. *See supra* notes 101-103 and accompanying text.

105 *See, e.g.*, Baca v. Shalala, 907 F. Supp. 351, 355 (D.N.M. 1995).

106 *See* 20 C.F.R. §§ 404.942, 416.1442 (2003).

107 *See* 20 C.F.R. §§ 404.953, 416.1453 (2003).

4. Appeals Council

A claimant who is dissatisfied with the decision of the ALJ following an administrative hearing has one final opportunity for administrative review at the SSA's Appeals Council. A request for review by the Appeals Council must be filed within sixty days of receipt of the hearing decision, unless the time limit is extended for good cause.[108] The Appeals Council also reviews decisions on its "own-motion," through both random and selective sampling that identifies cases "that exhibit problematic issues or fact patterns that increase the likelihood of error."[109]

The Appeals Council can grant or deny the request for review; if the petition for review is granted, the Council will either issue a decision or remand the case for further administrative action.[110] Social Security regulations list four grounds for review: an abuse of discretion by the ALJ; an error of law in the administrative hearing decision; the decision is not supported by substantial evidence; or the decision presents "a broad policy or procedural issue that may affect the general public interest."[111] The Appeals Council denies review in 74 percent of the appeals.[112] If review is granted, a claimant may request an oral argument; however, in most cases a decision or remand order is issued at the same time the Council grants review. The Council can also dismiss an appeal if not timely filed or under other limited circumstances.[113]

When a claimant seeks Appeals Council review of an ALJ decision, the entire claim is subject to review. This is certainly the case where the claimant requests a general review of an unfavorable decision. Full review by the Appeals Council is also appropriate where the claimant has requested review on certain issues in a partially-favorable decision, at least so long as the claimant was notified that a request for review of a partially favorable decision could lead to a full-scale review.[114]

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108 *See id.* §§ 404.968, 416.1468 (2003). *See also* Barnhart Statement, *supra* note 5 (proposing to replace the Appeals Council with a newly constituted "Oversight Panel").

109 20 C.F.R. §§ 404.969(b), 416.1469(b) (2003). Social Security regulations provide further that "[n]either our random sampling procedures nor our selective sampling procedures will identify cases based on the identity of the decisionmaker or the identity of the office issuing the decision." *Id.* §§ 404.969(b)(1), 416.1469(b)(1) (2003).

110 *See id.* §§ 404.967, 416.1467 (2003).

111 *Id.* §§ 404.970(a), 416.1470(a) (2003).

112 *See* SOCIAL SECURITY ADVISORY BOARD, DISABILITY DECISION MAKING: DATA AND MATERIALS 73 (Jan. 2001).

113 *See* 20 C.F.R. §§ 404.971, 416.1471 (2003).

114 *See, e.g.*, Williams v. Sullivan, 970 F.2d 1178, 1183 (3d Cir. 1992), *reh'g denied*, 1992 U.S. App. LEXIS 19009 (3d Cir. Aug. 13, 1992) (finding that where claimant sought review only

As discussed in more detail later in this article,[115] a claimant may submit "new and material" evidence to the Appeals Council together with a request for review. If "new and material evidence" is submitted, the Council will evaluate the entire record—consisting of the record from the administrative hearing and any new and material evidence submitted with the notice of appeal—and will grant a request for review, if the ALJ's decision is "contrary to the weight of the evidence currently in the record."[116]

A decision by the Appeals Council, either to deny a request for review or, following the granting of a request for review, to affirm, modify, or reverse the hearing decision, is a final decision by the Social Security Administration, subject to judicial review. However, if the case is remanded for further action by an ALJ, there is no final decision and the administrative process continues.

III. COMPILING THE RECORD FOR DECISION: OVERVIEW OF CURRENT REGULATIONS AND PRACTICES

The key to fair and accurate disability determinations lies in the quality of the record on which such decisions are made. Developing a comprehensive record for Social Security disability claims is difficult because the Social Security disability standard requires an assessment of often-complex and frequently changing medical and vocational evidence. Moreover, the information most relevant to a disability decision may be subjective and in dispute, requiring the decisionmaker to weigh and resolve conflicting evidence. It is not surprising, therefore, that some of the most important rules and regulations governing disability determinations address the development of the record for decision and that much of the controversy about the current multi-level disability determination process and the personnel involved in that process revolves around the same concern.

This part of the article provides an overview of current SSA regulations and practices relative to the evidentiary record for disability claims and appeals. The first two subsections discuss the process for developing the record and the rules on closing the record to additional evidence. These two aspects of regulating the evidentiary record reflect sometimes-competing policy interests. Specifically, if a full and complete record is the key to fair and accurate disability decisions, agency procedures should facilitate the development of all relevant evidence and continue to do so until a final decision is reached. On the

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of onset date, the Appeals Council reviewed entire record and denied benefits altogether).

[115] *See infra* Part III.B.2.

[116] 20 C.F.R. §§ 404.970(b), 416.1470(b) (2003).

other hand, however, if record-based disability decisions are to be subject to review, then review of those decisions should be based on the same evidentiary record as was the decision under review. This tension would not pose a problem if there were a clear line between making a decision and reviewing a decision on appeal. That line is blurred, however, in the Social Security disability determination process—particularly, at the later stages of administrative review. Thus, federal regulations provide:

> In each step of the review process, [claimants] may present any information [that claimants] feel is helpful to [their] case. Subject to the limitations on Appeals Council consideration of additional evidence . . ., [SSA] will consider at each step of the review process any information [claimants] present as well as all the information in [SSA's] records.[117]

A third subsection discusses the rules on attorneys' fees for Social Security cases and how they relate to the matters covered in this article.

A. *Developing the Record*

Overall, SSA regulations and practices are aimed at compiling a full and complete record. Certainly many individual claim files are developed as fully as needed, often with little difficulty. However, when a claim is developed poorly it affects not only the quality of the decision at that level but it also burdens the next level of decision or appeal. Because the Social Security disability determination process is spread over up to four levels of administrative decision and appeal, there is a tendency to put off the time-consuming and often tedious work of searching for and obtaining relevant records to the next stage of the process, and to avoid it altogether if the resulting denied claim is not appealed. The rules and practices relative to development of the record at each of the four levels of the disability determination process (initial decision and reconsideration, administrative hearing, and Appeals Council) are described below.

1. Initial Decision and Reconsideration: The Disability Determination Service Stage

Although the Social Security claim process begins at local SSA offices, relatively little work is done there on a disability claim file. The

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[117] *Id.* §§ 404.900(b), 416.1400(b) (2003). The rules concerning the consideration of additional evidence at the Appeals Council mentioned in this regulation are discussed below. *See infra* Part III.B.2.

initial application form requires that claimants identify the medical basis for any disability, state how any impairments affect their ability to perform work and to participate in daily activities, and provide information about relevant medical records and various sources of medical evidence. However, the local office staff looks only at the first step of the sequential evaluation process. Unless the claim can be denied because the claimant is currently engaging in "substantial gainful activity," the file is forwarded to the state DDS where the serious record development work begins.

Initially, the responsibility for developing the evidentiary record rests with the claimant.[118] This is consistent with the basic notion that claimants have the burden of proof on the issue of disability, which means that claimants must identify their impairments and provide the evidence necessary for SSA to determine whether those impairments establish that the claimant is disabled.[119] At the same time, SSA recognizes that it has a responsibility to develop the record once a claimant provides the basic information. Regulations provide that the agency will develop a claimant's "complete medical history" for the relevant time period.[120] Thus, although claimants are responsible for providing their own evidence, SSA is expected to participate in developing the record.

In particular, SSA will obtain medical records from a claimant's identified medical sources and will pay for records it requests.[121] This practice follows from a series of statutory and regulatory provisions that require SSA to "make every reasonable effort" to obtain medical information from claimants' treating sources and to weigh treating source opinions appropriately.[122] SSA is also authorized to order a consultative examination if the claimant's medical sources cannot, or will not, provide the evidence needed to make a decision on the claim,

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118 *See id.* § 404.704 (2003) ("When evidence is needed to prove your eligibility or your right to continue to receive benefit payments, you will be responsible for obtaining and giving the evidence to us.").

119 *See id.* §§ 404.1512(a), 416.912(a) (2003), stating the following:

> In general, you have to prove to us that you are blind or disabled. This means that you must furnish medical and other evidence that we can use to reach conclusions about your medical impairment(s). If material to the determination whether you are blind or disabled, medical and other evidence must be furnished about the effects of your impairment(s) on your ability to work, or if you are a child, on your functioning, on a sustained basis. We will consider only impairment(s) you say you have or about which we receive evidence.

Id. See also 20 C.F.R. §§ 404.1512(c), 416.912(c) ("You must provide medical evidence showing that you have an impairment(s) and how severe it is during the time you say that you are disabled.").

120 *Id.* §§ 404.1512(d), 416.912(d) (2003).

121 *See id.* §§ 404.1512(d), 404.1514, 416.912(d), 416.914 (2003).

122 *See* 42 U.S.C. § 423(d)(5)(B) (2003). *See also supra* Part II.A.3. (discussing the rules on weighing medical source opinions).

and SSA will pay for any such examination it orders.[123] SSA retains the right, however, to decide a claim on the basis of whatever information is available if the claimant does not provide information requested.[124]

As noted earlier,[125] DDS disability examiners work together with medical or psychological consultants. Although the disability examiner and the consultant share the responsibility for making the disability decision, the disability examiner usually takes the lead with respect to record development. After reviewing the file, the examiner decides if additional evidence is needed and, if so, from which medical sources additional information will be requested. Most requests are made to traditional medical sources, such as doctors and medical facilities; however, depending on the nature of the claim, requests may also be made to nonmedical sources, such as family members, social workers, and, for disabled children's SSI claims, teachers and daycare workers.[126] Although disability examiners usually decide whether to contact a particular medical source, examiners will seek advice from the medical consultant if the claim presents unusual evidentiary issues.

SSA follows essentially the same procedures for reconsideration as for the initial decision, except that the process begins with an existing file and different examiners and consultants are used. There is, however, one major difference in termination cases where a beneficiary is found to no longer be disabled due to medical reasons. Under those circumstances, the beneficiary can request a face-to-face "disability hearing" as part of the reconsideration process.[127]

2. Administrative Hearing: The Administrative Law Judge Stage

The administrative hearing record begins with the evidence compiled by the DDS during the initial processing of the claim, including reconsideration, which DDS forwards to OHA. The ALJ, working together with OHA staff, then reviews and develops the record independently, without assuming that the DDS obtained all of the information available at the time it made its decisions. In addition to

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123 *See* 20 C.F.R. §§ 404.1517, 416. 917 (2003).

124 *See id.* §§ 404.1516 (2003) (stating that "[i]f you do not give us the medical and other evidence that we need and request, we will have to make a decision based on information available in your case."). *See also* 20 C.F.R. §§ 404.1516, 416.916 (stating that "[w]e will not excuse you from giving us evidence because you have religious or personal reasons against medical examinations, tests, or treatment.").

125 *See supra* Part II.B.1.

126 *See generally* 20 C.F.R. §§ 404.1513, 416.913 (2003) (identifying sources that can provide evidence of an impairment). Non-medical sources are particularly appropriate for a child's SSI claims where the issue is "functional equivalence" of a listed impairment. *See also Id.* § 416.926a (2003).

127 *See generally Id.* §§ 404.914, 416.1416 (2003).

new material submitted by the claimant, OHA staff can obtain existing medical reports from treating sources or hospitals and can order consultative examinations. Sometimes the evidence obtained at the administrative hearing stage could not have been obtained earlier, either because the claimant was not aware of a previously existing condition or the claimant's condition changed since the last DDS decision was made. However, OHA often obtains medical records and reports that could have been obtained by the DDS in time for the initial decision.[128]

Once the claimant's file has been completed, the case is set for hearing unless the ALJ decides to issue a favorable decision without a hearing or to remand the claim for further evaluation at the DDS agency level. At the hearing itself, claimants, on their own or through their representatives,[129] can present any testimony and additional documentary evidence they wish.

3. Final Administrative Appeal: The Appeals Council Stage

The Appeals Council reviews factual findings only to assure that they are supported by substantial evidence. However, if additional evidence is submitted to the Council, it will review findings to determine if they are "contrary to the weight of the evidence" in the record, including the new evidence.[130] As discussed below in the context of closing the record, additional evidence can be submitted to the Appeals Council only if it is "new and material", and only if it relates to the claimant's condition up to the date of the administrative decision.

Apart from evidence submitted by the appellant, there is very little additional development of the evidentiary record at the Appeals Council level. The Appeals Council disposes of virtually all cases on the basis of the written record, even when cases are accepted for review. There is a small medical support staff that may be consulted about further development of the medical record; however, if serious medical questions are raised, the Council usually will remand the claim back to the ALJ.[131] Moreover, the Council may remand the claim a second time

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[128] Under current regulations, this same practice can continue through to the Appeals Council. *See infra* Part III.B.2.

[129] As mentioned earlier, the rate of claimant representation by attorneys is now about 70%, with 18% of claimants represented by non-attorneys. *See supra* text accompanying notes 20-21.

[130] 20 C.F.R. §§ 404.970, 416.1470 (2003).

[131] *See id.* §§ 404.977(a), 416.1477(a) (2003), stating the following:

> The Appeals Council may remand a case to an administrative law judge so that he or she may hold a hearing and issue a decision or a recommended decision. The Appeals Council may also remand a case in which additional evidence is needed or additional action by the administrative law judge is required.

Id. See also id. §§ 404.976(b)(2), 416.1476(b)(3) (2003), stating the following:

if it appears that new evidence is still needed following a remand.[132]

B. *Closing the Record and Reopening Decisions*

The concept of "closing" a record arises in two very different contexts: preparing a record for decision and preserving a record of decision for review. The process of preparing a record for decision usually continues until the decision is reached; the record is closed at the time (or just before) the decision is made. This is what happens at the first two levels of disability claim processing: the initial decision and reconsideration. As described above, the DDS is charged first with developing the record to the point that a competent disability decision can be made. Then, once the record is complete, the DDS makes its decision based on the record it compiled. Closing the record does not become a real issue until the ALJ stage.

1. Closing the Record at the Administrative Law Judge Stage

If a reconsideration decision is appealed, the record compiled at the DDS is sent to the OHA and becomes the core record for the administrative hearing. As noted above, the ALJs and OHA staffs then continue developing the record, as needed. In addition, the claimant-appellant is also free to submit additional evidence both before the hearing[133] and at the hearing itself.[134] This must be so, as the administrative hearing is a *de novo* review of the claim and the ALJ is

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> If additional evidence is needed, the Appeals Council may remand the case to an administrative law judge to receive evidence and issue a new decision. However, if the Appeals Council decides that it can obtain the evidence more quickly, it may do so, unless it will adversely affect your rights.

Id.

[132] *See id.* §§ 404.977(e)(2), 416.1477(e)(2) (2003), stating that after receiving a recommended decision on remand:

> If the Appeals Council believes that more evidence is required, it may again remand the case to an administrative law judge for further inquiry into the issues, rehearing, receipt of evidence, and another decision or recommended decision. However, if the Appeals Council decides that it can get the additional evidence more quickly, it will take appropriate action.

Id.

[133] Indeed, claimants are expected to identify additional evidence that will be submitted already at the time they request the hearing. *See id.* §§ 404.933(a)(3), 416.1433(a)(4) (2003) ("You should include in your request . . .[a] statement of additional evidence to be submitted and the date you will submit it.").

[134] *See id.* §§ 404.950(a), 416.1450(a) (2003) ("Any party to a hearing has a right to appear before the administrative law judge, either in person . . . to present evidence and to state his or her position. A party may also make his or her appearance by means of a designated representative . . . .").

directed specifically to decide the claim "based on evidence offered at the hearing or otherwise included in the record."[135] Moreover, the ALJ has an affirmative duty to assure that the record, including any live testimony offered by claimants and their witnesses, includes all of the information necessary to decide the case.[136] Thus, Social Security regulations provide that "[a]t the hearing, the administrative law judge looks fully into the issues, questions [the claimant] and the other witnesses, and accepts as evidence any documents that are material to the issues."[137]

Although less clearly stated and perhaps subject to some conditions, the record may still remain open even after the hearing. Sometimes, the claimant will request additional time to obtain evidence and the ALJ will simply hold the record open for a set number of days after the conclusion of the hearing in order to give the claimant time to do so. The ALJ may also continue the hearing to a later date, pending receipt of additional evidence, or may reopen the hearing if additional evidence becomes available before the decision is issued.[138]

2. Submitting New Evidence at the Appeals Council

A claimant may submit additional evidence to the Appeals Council that will be considered together with the record from the hearing; however, the evidence must be "new and material" and it must relate to the time period relevant to the administrative hearing decision.[139] New evidence that is relevant only to the claimant's condition after the date of the hearing decision can be considered only in relation to a new application covering a new period of disability.[140] It can be very

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135 *Id.* §§ 404.953(a), 416.1453(a) (2003).

136 *See, e.g.*, Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994) ("Even when a claimant is represented by counsel, an 'ALJ has a basic obligation in every social security case to ensure that an adequate record is developed during the disability hearing consistent with the issues raised.'") (quoting Henrie v. U.S. Dep't of Health & Human Servs., 13 F.3d 359, 361 (10th Cir. 1993)).

137 20 C.F.R. §§ 404.944, 416.1444 (2003).

138 *See id.* §§ 404.944, 416.1444 (2003), stating the following:

> The administrative law judge may stop the hearing temporarily and continue it at a later date if he or she believes that there is material evidence missing at the hearing. The administrative law judge may also reopen the hearing at any time before he or she mails a notice of the decision in order to receive new and material evidence.

See also Social Security Administration, Office of Hearings and Appeals, Litigation Law Manual [hereinafter "HALLEX"] § I-2-680(C) ("If an ALJ decides to admit additional evidence into the record of a case, or to conduct a supplemental hearing, he or she must reopen the record.").

139 20 C.F.R. §§ 404.976(b), 416.1476(b) (2003).

140 *See id.* §§ 404.976(b)(1), 416.1476(b)(1) (2003), stating the following:

> If you submit evidence which does not relate to the period on or before the date of the administrative law judge hearing decision, the Appeals Council will return the additional evidence to you with an explanation as to why it did not accept the

important for a claimant to be able to submit additional evidence concerning the time period covered by the administrative hearing decision because under the doctrine of administrative res judicata, any new application covering the same time period will be bound by an earlier finding of nondisability for that period.[141]

Although it seems clear that the Appeals Council must include any properly submitted new evidence that meets the "new and material" standard when deciding whether to grant a request for review, there is some disagreement as to whether such evidence can be considered by the courts when the Appeals Council refuses to grant review. Some circuits have held that such evidence is not part of the administrative record because the decision reviewed in the courts is the decision of the ALJ based only on the evidence that was submitted at the hearing. According to this position, the district court may consider new evidence even for this purpose only if it satisfies a stricter standard, mentioned below, for submitting "new and material" evidence to the court.[142] Other courts have ruled that any additional evidence submitted to the Appeals Council is properly part of the administrative record before the court, which means that the court can consider that evidence for purposes of substantial evidence review.[143]

Federal court review of SSA's final decision is based exclusively on the record developed at the administrative hearing or before the Appeals Council; new evidence in support of the claim cannot be introduced at the district court. However, if a claimant comes across "new" and "material" evidence after the administrative process is complete and can show "good cause" for failing to submit it earlier, the evidence can be presented to the court as a basis for remand.[144]

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additional evidence and will advise you of your right to file a new application.

Id. If a new application for Disability Insurance benefits is filed within six months, the date of the request for Appeals Council review will be used as the filing date for the new application. *Id.* § 404.976(b)(1) (2003). For SSI claims, the date of the Appeals Council request is used as the filing date only if the new application is filed within sixty days. *Id.* § 416.1476(b)(1) (2003).

141 *See* Bogle v. Sullivan, 998 F.2d 342, 346 (6th Cir. 1993) (stating that an earlier final decision is a basis for denying subsequent applications involving the same facts and issues existing at the time of the first decision).

142 *See, e.g.*, Matthews v. Apfel, 239 F.3d 589, 593 (3d Cir. 2001), stating the following:

> [W]hen the Appeals Council has denied review . . . [and] . . . when the claimant seeks to rely on evidence that was not before the ALJ, the district court may remand to the Commissioner but only if the evidence is new and material and if there was good cause why it was not previously presented to the ALJ.

Id.

143 *See, e.g.*, Cunningham v. Apfel, 222 F.3d 496, 500 (8th Cir. 2000) ("The newly submitted evidence thus becomes part of the 'administrative record,' even though the evidence was not originally included in the ALJ's record.") (citations omitted).

144 *See* 42 U.S.C. § 405(g) (2003).

3. Reopening a Decision

As noted earlier, one can always file a new application for a new period of disability despite a final adverse decision on an earlier claim. Rather than simply reapply for benefits, a claimant can request that an earlier application be reopened. It is important to note, however, that filing a new application leaves the earlier decision in place. Therefore, to the extent that the new application overlaps with the earlier one, such as where the claimant's insured status has lapsed and he or she must prove onset during part of the period covered in the earlier application, the claimant can be bound by the earlier finding of nondisability through the operation of administrative res judicata.[145] An application can be reopened on SSA's own initiative as well.[146]

There are three separate sets of criteria for reopening, defined by the time period within which a request to reopen is filed or the decision to reopen is made by SSA. The criteria are as follows: within one year of the date of the decision, "for any reason"; within four years for Disability Insurance benefits or within two years for Supplemental Security Income, upon a showing of "good cause" (that includes the furnishing of "new and material" evidence).[147] In addition, a case may be reopened if, at any time, the decision "was obtained by fraud or similar fault" or under certain other specific, limited circumstances dealing primarily with errors unrelated to disability determination.[148] However, SSA is not required to reopen a claim; the regulations state only that SSA "may" reopen a claim under one of the prescribed conditions. Moreover, a refusal to reopen is not subject to either administrative or judicial review.[149]

A reopened application is reviewed and revised, if appropriate, based on the evidence in the record and any supplemental evidence submitted by the claimant or obtained by the Administration. A revised decision can be appealed in the same manner as any other decision.[150]

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145 *See, e.g.*, Drummond v. Comm'r, 126 F.3d 837, 842-43 (6th Cir. 1997).

146 *See* 20 C.F.R. §§ 404.987, 416.1487 (2003).

147 *Id.* §§ 404.988, 416.1488 (2003).

148 *See id.* §§ 404.988, 416.1488. A misstatement on an application can constitute "similar fault" for these purposes where the claimant knew that the information was incorrect; Heins v. Shalala, 22 F.3d 157, 162 (7th Cir. 1994). Until recently, there was some doubt as to whether SSA can reopen claims according to the same criteria as claimants. However, 1994 regulations make it explicitly clear that SSA may reopen claims on its own initiative according to the same criteria as those applicable to requests by claimants. *See also* 59 Fed. Reg. 8,532 (1994); 20 C.F.R. §§ 404.987(b), 416.1487(b) (2003).

149 There is an exception for judicial review, if the refusal gives rise to a "colorable" constitutional claim. *See* Califano v. Sanders, 430 U.S. 99 (1977).

150 *See* 20 C.F.R. §§ 404.993, 416.1493 (2003).

C. *Attorney's Fees*

There are several sources of attorney's fees in Social Security cases. Most awards by far are paid out of the claimant's benefits pursuant to the Social Security Act and federal regulations.[151] Another significant source of fees is the Equal Access to Justice Act ("EAJA"), a government-wide fee-shifting statute that authorizes the payment of fees out of agency funds under limited circumstances. Congress chose to regulate the collection of attorney's fees paid by claimants in order to achieve the potentially conflicting goals of encouraging capable attorneys to represent Social Security claimants and preventing attorneys from receiving excessive contingent fees.[152] The EAJA has a different purpose: to hold the government accountable for the cost of representation when a citizen or small business successfully litigates against the government on an issue that probably shouldn't have been litigated in the first place.

The rules concerning both types of fees are relevant to the issues covered in this article. Fees paid by claimants are tied to a significant degree to the amount of past-due benefits awarded when a claim is granted; as delay will increase the amount of past-due benefits, this can add a perverse incentive to the process. EAJA fees are available currently in Social Security cases only if the claimant prevails against SSA in court.[153] With respect to the administrative process, the EAJA applies only to "adversary" proceedings; therefore, introducing a government representative (a potential adversary) at the administrative hearing could increase substantially the awarding of EAJA fees in Social Security cases.

1. Fees Available under the Social Security Act

A request for fees under the Social Security Act for representation of a claimant at an administrative hearing or before the Appeals Council must be made in writing; the request must be detailed, and must include a complete list of services performed and the amount of time spent.[154]

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[151] *See generally* 42 U.S.C. §§ 406, 1383(d)(2) (2003); 20 C.F.R. §§ 404.1720-35, 416.1520-35 (2003).

[152] *See generally* Pappas v. Bowen, 863 F.2d 227, 230-31 (2d Cir. 1988); Dawson v. Finch, 425 F.2d 1192 (5th Cir. 1970).

[153] *See* 28 U.S.C. § 2412 (2003). To a limited extent, EAJA fees may be awarded for administrative representation following a remand by federal court. *See infra* text accompanying notes 165-66.

[154] The factors included in evaluating a fee request are the type and amount of services performed, the difficulty of the case, including the skill required of the representative, and the

Another option is for a claimant and his or her representative to agree on a fee, which cannot exceed 25 percent of the claimant's past-due benefits or $5,300, whichever is less. The agreed fee will be awarded automatically unless objected to by the claimant, the representative, or the agency.[155]

SSA will withhold up to 25 percent of past-due benefits for direct payment to attorneys in DI cases.[156] Effective February 1, 2000, Congress imposed a "user fee" on attorneys whose fees are paid out of withheld past-due benefits; the user fee comes out of the approved attorney's fee and is not an additional cost to the claimant.[157] SSA's authority to set the amount of an attorney's fee award operates separately from the direct payment program. Thus, a fee can be authorized for an amount greater or smaller than the amount that can be withheld and paid directly; indeed, SSA can authorize a fee even when no past-due benefits would be due. There is no authority for withholding benefits for fees in SSI cases.[158]

Courts can also award fees for representation in judicial proceedings in DI cases. The Social Security Act limits the amount of an attorney's fee for court litigation in DI cases to a maximum of 25 percent of past-due benefits.[159] Fees for SSI cases in court are governed by SSA regulations, but not by the Social Security Act.[160]

2. Fees Available under the Equal Access to Justice Act

The EAJA permits prevailing parties to obtain awards of attorney fees and other expenses against the United States in certain administrative proceedings and judicial actions, if the government's action is found not to be substantially justified.[161]

The Act applies to cases where the SSA claimant prevails in

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results achieved. *See generally* 20 C.F.R. §§ 404.1725, 416.1525 (2003).

155 *See* 67 Fed. Reg. 2477 (2002); HALLEX, *supra* note 138, at I-1-2-12.

156 *See* 42 U.S.C. § 406(a) (2003); 20 C.F.R. §§ 404.1720, 404.1725 (2003).

157 42 U.S.C. § 406(d) (2003).

158 *See* 20 C.F.R. § 416.1520 (2003).

159 *See* 42 U.S.C. § 406(b)(1) (2003).

160 *Compare* 20 C.F.R. § 416.1540(b) (2003) *with* 42 U.S.C. § 1383(d)(2) (2003).

161 *See* 5 U.S.C. § 504(a)(1) (2003), providing that:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

Id.

federal court.[162] But with limited exceptions, it has not applied to the SSA administrative hearing process because the Act limits coverage to "adversary adjudications," which are defined to include adjudications "under [5 U.S.C. §554] in which the position of the United States is represented by counsel or otherwise . . . ."[163] This raises the question whether the use of government attorneys in SSA disability proceedings would trigger broader EAJA applicability in SSA administrative adjudication.

Attorney's fees may now be awarded under the EAJA for representation in administrative hearings in Social Security disability proceedings only in certain limited situations—involving cases remanded by the federal courts. In *Sullivan v. Hudson*,[164] the Supreme Court held that while EAJA attorney's fees may not be recovered for typical SSA administrative proceedings—since such proceedings are not adversarial—attorney's fees may be granted when a Social Security disability denial has been appealed to federal court and then remanded to the agency. [165] In these instances, the proceeding has become an "adversary adjudication" for purposes of the EAJA.[166]

In 2002, the Supreme Court resolved the question of the possible overlap of the EAJA and the Social Security Act's attorney fee provisions. *Gisbrecht v. Barnhart*[167] held that Congress had provided

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162 *See id.* § 2412(d) (2003).

163 *Id.* § 504(b)(1)(C) (2003).

164 490 U.S. 877 (1989).

165 *See id.* at 892, in which the Court stated the following:

> We conclude that where a court orders a remand to the Secretary in a benefits litigation and retains continuing jurisdiction over the case pending a decision from the Secretary which will determine the claimant's entitlements to benefits, the proceedings on remand are an integral part of the "civil action" for judicial review, and thus attorney's fees for representation on remand are available subject to the other limitations in the EAJA.

Id.

166 *See id.* Justice White, writing for four dissenters, criticized the majority for ignoring the "plain language" of EAJA's definition of "adversary adjudication," which requires the presence of government representation. *Id.* at 893. Subsequently, in *Melkonyan v. Sullivan*, 501 U.S. 89, 102 (1991), the Supreme Court clarified the timing of when EAJA fees may be sought following Social Security disability proceedings. The Court said:

> In sentence four [of 42 U.S.C. § 405(g)] cases, the filing period begins after the final judgment ("affirming, modifying, or reversing") is entered by the court and the appeal period has run, so that the judgment is no longer appealable. . . . In sentence six cases, the filing period does not begin until after the postremand proceedings are complete, the Secretary returns to the court, the court enters a final judgment, and the appeal period runs.

Id. See also Shalala v. Schaefer, 509 U.S. 292 (making clear that a Social Security claimant who obtains a sentence-four judgment reversing the Secretary's denial of benefits meets the description of a 'prevailing party,' given that not only do sentence-four remands terminate the litigation with victory for the plaintiff, but a judgment authorized by sentence-four becomes a "final judgment" when the time for appeal has expired); Arisitzabal v. Chater, 1998 WL 426634 * 1 (E.D.N.Y. 1998).

167 535 U.S. 789 (2002).

that EAJA fees for claimants prevailing in court supplement the fees payable to attorneys out of the claimants past-due benefits under § 406(b) of the Social Security Act: "Fee awards may be made under both prescriptions, but the claimant's attorney must 'refun[d] to the claimant the amount of the smaller fee.'"[168]

3. Would the Equal Access to Justice Act Apply to Social Security Administration "Adversarial" Adjudications?

The question of whether the injection of government representatives into SSA administrative hearings would, perforce, make them all covered by EAJA was raised in the comments submitted to SSA's original proposed rule setting up the SSARP. SSA responded:

> There are several reasons why we do not believe the EAJ Act will appreciably affect SSA proceedings under this project. First, it remains to be determined whether the circumstances of the SSA representative project render the adjudication adversarial for purposes of the EAJ Act. Second, there is some question as to whether the existing attorney fee provisions of the Social Security Act preempt the provisions of the EAJ Act.[169] Finally, there will presumably be few cases in which the position taken by the SSA representative will not be "substantially justified," since the SSA representative will have the authority to propose allowance of those claims which present a clear case for entitlement or eligibility for benefits.[170]

After the end of the project, SSA addressed this issue again when it issued rules implementing 1985 amendments to EAJA, Public Law No. 99-80, because some cases decided under the project that were still pending could have been eligible for EAJA fees.[171] SSA explained that although HHS has taken the position that proceedings in this project were not within the scope of the EAJA as originally enacted, the legislative history of the amendments indicated that the Act should apply to cases in this project. Therefore "HHS has determined that the EAJA should be applied to all cases in this project where the project representative, at a hearing, represented an agency position opposing entitlement to benefits."[172]

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168 *Id.* at 796 (citing Pub. L. No. 99-80, § 3, 99 Stat. 186 (1985)).

169 Authors' note—this was resolved in 1985. *See* Gisbrecht v. Barnhart, 535 U.S. 789 (2002).

170 Final Rule: Project To Improve the Hearing Process Through the Involvement of SSA Representatives, 47 Fed. Reg. 36,117, 36,121 (Aug. 19, 1982).

171 Implementation of the Equal Access to Justice Act in Agency Proceedings, 52 Fed. Reg. 23,311 (June 19, 1987) (implementing Pub. L. No. 90-80 which became effective on Aug. 5, 1987).

172 *Id.* at 23,312 (citations omitted).

Given this history and the recent caselaw extending EAJA coverage to some non-APA administrative adjudications,[173] it would be difficult for SSA to argue that its ALJ hearings would not be covered by EAJA if its representatives were to participate as advocates in the hearings by "opposing entitlement to benefits."[174]

Under current law, with EAJA primarily covering only court litigation against the SSA, the Supreme Court has ruled that fee awards may be made under both statutes, but that claimant's attorneys must refund to claimants the amount of the smaller fee.[175] Fees awarded under EAJA are paid from the agency's budget,[176] unlike fees awarded under the Social Security Act which are payable to attorneys out of the claimants past-due benefits. This means that claimant's attorneys would have the incentive to seek fees under both statutes so that their client's benefits are reduced as little as possible. If EAJA coverage were expanded to all SSA administrative adjudications by virtue of the addition of government representatives, the potential budget implications for SSA could be quite significant due to the high volume of cases.

This is true notwithstanding the fact that EAJA awards in individual SSA cases are relatively small when compared to such fees in other court litigation against the government. In 1993, Harold Krent analyzed data on SSA EAJA fee applications between June 1989 and June 1990, drawn from SSA's own reports and data collected by the Administrative Office of the U.S. Courts ("AO").[177] The AO's data on 385 EAJA applications in Social Security cases showed that 350 (91 percent) were granted (thus showing that the substantial justification defense does not pose much of a hurdle).[178] For those 350 cases the mean award was $3346.[179] More complete data compiled by SSA showed 2007 applications for EAJA fees resolved, with 1700 (85 percent) granted.[180] Of the applications granted, the mean request was $3584,[181] and the mean award was $3244.[182] These figures compared to

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173 *See, e.g.*, Lane v. USDA, 120 F.3d 106 (8th Cir. 1997) (finding adjudication conducted by hearing officers in the USDA's National Appeals Division are "adversary adjudications" covered by EAJA); Collard v. U.S. Dep't of Interior, 154 F.3d 933 (9th Cir. 1998) (holding that although statute governing extinguishing of mining patent did not expressly call for formal APA adjudication, an APA hearing was constitutionally required; thus under *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), the hearing was governed by section 554 of the APA, thus making plaintiffs eligible for EAJA reimbursement).

174 *See supra* text accompanying note 163-64.

175 *See* Gisbrecht v. Barnhart, 535 U.S. 789 (2002).

176 *See* 5 U.S.C. § 504(d) (2003).

177 *See* Harold J. Krent, *Fee Shifting Under The Equal Access To Justice Act—A Qualified Success*, 11 YALE L. & POL'Y REV. 458, 485-89 (1993).

178 *See id.* at 487.

179 *See id.*

180 *See id.* at 487-88.

181 *See id.* at 485.

a mean of $48,000 in non-SSA court litigation and $10,305 for all (non-SSA) agency adjudications during the same period.[183] Even so, with over 250,000 SSA ALJ reversals of initial denials a year, if 200,000 of these resulted in awards of $5000 (taking into account inflation since 1990), that could easily result in another $100 million drain on SSA's budget (since EAJA fees must be paid from agency appropriations according to 5 U.S.C. § 504(d)).

This potential drain on the public fisc, if broad EAJA coverage of administrative hearings were to be triggered by casting the government "representative" in an adversarial role, is a relevant, if not a determinative, consideration in deciding how to best provide additional governmental resources to the development of the record for decision.

IV. SOCIAL SECURITY ADMINISTRATION'S REPRESENTATION PROJECT

A. *Background*

The SSARP, begun in 1982, was described as follows:

> SSA has decided to undertake a limited test using special SSA representatives in connection with disability hearings in selected hearing offices. We wish to determine whether the participation of SSA representatives will sharpen factual issues, improve case record development and contribute to improved quality, consistency and timeliness of case dispositions at the hearing level.
>
> When the case file is received at the hearing office, the SSA representative will examine it to determine whether it is ready for a hearing. If necessary the SSA representative will initiate further case record development. After the case is fully prepared for a hearing it will be assigned to an administrative law judge who will review the record and conduct the hearing.
>
> During the prehearing stage, the SSA representative may contact the claimant's representative to clarify the issues in dispute. In addition, the SSA representative may meet with witnesses who will appear at the hearing. The SSA representative may recommend to the administrative law judge that the issues in dispute, as agreed to by the SSA representative and the claimant's representative, be considered as the issues at the hearing. The SSA representative may also petition the ALJ to include new issues, or to dismiss the case for jurisdictional reasons or may ask that the administrative law judge disqualify himself or herself when appropriate under the regulations. On the other hand, where the evidence clearly establishes the

182 *See* Harold J. Krent, supra note 177, at 488.

183 *See id.* at 485, 489.

> claimant's entitlement, the SSA representative may recommend that the administrative law judge issue a favorable decision without the need for a hearing.
>
> If the claimant is represented at the hearing, the SSA representative will also appear at the hearing. The SSA representative will be able to carry out all of the functions of a party to the hearing. . . . After the hearing, the SSA representative will not participate in any proceedings before the Appeals Council, although the Appeals Council may exercise its authority to review any case on its own motion. The SSA representative may be involved in cases which are remanded by the Appeals Council if the SSA representative participated in the prior proceedings which are the basis for the Appeals Council remand order.[184]

In the preamble to this final rule, the agency explained how the final rules differed from the proposed rules.[185] It listed a number of changes made after the comment periods. The SSA representative would be directly employed by OHA and would participate in the hearing whenever the claimant has an appointed representative at the hearing, whether an attorney or a nonattorney. Her or his role would not be limited to the issue of disability nor would s/he be prohibited from meeting with the claimant's witnesses, subject to the consent of the claimant and his or her representative. On the other hand, s/he would not be permitted to refer cases to the Appeals Council for possible own-motion review. All disability cases in the participating hearing offices would be included.

The project commenced in October 1982 in five hearing offices (Baltimore, MD; Brentwood, MO; Columbia, SC; Kingsport, TN; and Pasadena, CA) with the expectation that it would last "at least" one year.[186] The Brentwood hearing office ceased to participate in October 1983. In 1984, the SSA issued a notice continuing the project for at least another year.[187] It explained that the reason for the extension was "[d]ue to the limited duration of the project to date, the normal start-up problems in implementing such a change in the usual hearing process, and the limited Appeals Council and court experience to date."[188]

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184 Final Rule: Project To Improve the Hearing Process Through the Involvement of SSA Representatives, 47 Fed. Reg. 36,118 (Aug. 19 1982). The regulations were initially proposed on January 11, 1980 (45 Fed. Reg. 2345). That proposal was withdrawn, after public hearings, in a notice published on July 14, 1980 (45 Fed. Reg. 47,162). On February 18, 1982, SSA published a notice reinstating the proposed rules (47 Fed. Reg. 7261).

185 *See id.* at 36,118-36.

186 *See id.* at 36,118.

187 Department of Health and Human Services, Social Security Administration, Federal Old Age, Survivors and Disability Insurance and Supplemental Security Income for the Aged, Blind, and Disabled; Project To Improve the Hearing Process Through the Involvement of SSA Representatives, Notice of Continuance of the SSA Representation Project, 49 Fed. Reg. 13,872 (April 9, 1984).

188 *Id.*

In 1986, the SSA issued a notice of continuance and restructuring of the SSA representation project under auspices of the adjudicatory improvement project ("AIP").[189] It stated that under the AIP:

> [A]n agency-wide task force that will manage all aspects of the field testing of the Social Security Administration (SSA) Representation Project and conduct all data collection, evaluation, and planning activities required to determine whether (1) permanent implementation of SSA representation should be proposed; (2) restructuring of the operational format of the SSA Representation Project; and (3) evaluation of testing under this restructured format after 1 year beginning April 30, 1986.[190]

The agency also concluded that for the next year, "testing [should] be continued in a restructured format and evaluated under agency-wide auspices." [191] It determined that the project should be restructured so that: (1) the representatives were separated from participating ALJ hearing offices; (2) when a request for hearing is filed, the SSA component having the claim file(s) will forward it directly to the office of the SSA representative; (3) the efficiency with which a single office of representatives can service more than one ALJ hearing office is tested; and (4) communication and feedback is improved by establishing liaison functions between the offices of the SSA representatives and the State agencies, district offices, hearing offices and SSA central office components. In addition enhanced data and management, case sampling, cost analysis, and opinion polls were suggested.[192]

Following the testing SSA pledged to evaluate the results to determine whether SSA representation should be continued or terminated. It also stated it would not expand the program without going though rulemaking or propose legislative implementation without consultation with Congress.

In July 1986, the federal district court issued an injunction against continuation of the program in *Salling v. Bowen*.[193] While an appeal was pending with the Fourth Circuit, the SSA decided to end the program and revoked the regulations "pertaining to all aspects of the field testing of the [SSARP]."[194] The appeal was never heard.

The agency gave a rather terse explanation for this decision:

> After consideration of all the factors involved, we have decided

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189 *See* Notice of Continuance and Restructuring or the SSA Representation Project under Auspices of the Adjudicatory Improvement Project, 51 Fed. Reg. 21,156 (June 11, 1986).

190 *Id.*

191 *Id.*

192 *Id.* at 21,157.

193 641 F. Supp. 1046 (W.D. Va. 1986). The *Salling* decision is discussed *infra* Parts IV.C. & IV.D.

194 Final Rule, Discontinuance of the SSA Representation Project, 52 Fed. Reg. 17,285 (May 7, 1987).

> that the Project will not be resumed, regardless of the ultimate disposition of the litigation. The decision to terminate is based on managerial, administrative, and budgetary considerations, and was made only after careful consideration of all factors, including the fact that SSA had to stop the Project to comply with the district court's injunctive order. Additionally, SSA had made commitments to Congress that the Project and the agency's evaluation of government representation in Social Security hearings would be concluded by April 1987. Resumption of the Project so as to generate sufficient information on which to evaluate government representation in Social Security hearings prior to that date is not possible. With increasing workloads before SSA, it was decided that the administrative resources which would have had to have been committed to the resumption of the Project and further testing of the concept of government representation can best be utilized in other ways. . . .
>
> The Department has since chosen to discontinue the Project, regardless of the outcome of the lawsuit, is no longer holding hearings under these regulations, and so informed the Court of Appeals for the Fourth Circuit, where the district court's order was on appeal. Repeal of these regulations is therefore merely a formality and use of notice and public comment procedures is unnecessary.[195]

B. *Social Security Administration's Interim Report on the Social Security Administration Representation Project*

In June 1986, SSA, under the auspices of the Adjudicatory Improvement Project, prepared a report on the SSARP covering the period from its inception on October 12, 1982 to September 30, 1985.[196] It was called an interim report because a final report was to have been issued after further testing, but with the termination of the project, no such report was made.

Data was compiled on 15,552 SSARP case dispositions. In 60.7 percent of these cases, SSA representatives undertook prehearing case development. By contrast, ALJs undertook this responsibility in only 2 percent of the cases, thus leading the study to conclude that there was "a high degree of ALJ acceptance of SSA representative evidence development."[197]

More specifically, the study found that SSA representatives primarily initiated case development from treating physicians—

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195 *Id.* at 17,286.

196 *See SSA Representation Project*, SSA INTERIM REPORT (1986).

197 *Id.* at 2.

requesting information from such sources in 47 percent of all project dispositions. This compares with requests for consultative examinations in 11.5 percent of the cases. Other existing medical evidence was sought in 22 percent of the cases.[198] To some extent this emphasis was affected by the development practices of the various state DDSs—which requested consultative examinations in over 50 percent of the cases and had widely different rates of providing additional medical evidence.[199]

In addition, SSA representatives recommended dismissals in 2.8 percent of the cases (which were accepted by the ALJs 74.3 percent of the time). They also recommended "fully favorable" decisions in 7 percent of the cases (which were approved by ALJs in 90.7 percent of the time). This represented 17.5 percent of all fully favorable decisions. These "favorables" were recommended at the same rate for represented and unrepresented claimants.[200]

SSA representatives also made recommendations to the ALJs for calling expert medical or vocational witnesses. They did so in 18.9 percent of the cases involving unrepresented claimants and in 28.6 percent of the cases involving represented claimants. The great majority of these experts were vocational experts.[201]

Once the case made it to the hearing stage, SSA representatives participated only when the claimant was represented. This was the case in 66.3 percent of the project dispositions, and in 72.1 percent of hearings held in project cases (a total of 8,519 hearings). In such hearings, SSA representatives submitted additional evidence in 2.6 percent of these hearings, while claimant representatives did so in 80 percent of the hearings. Postponements or continuances were requested in 22 percent of these cases, but 85.2 percent of these requests were filed by claimant's counsel, compared to 2.3 percent by the SSA representative.[202] As for hearing length, those involving unrepresented claimants averaged thirty-nine minutes, while those involving represented claimants (and SSA representatives) averaged fifty-three minutes.[203]

The overall hearing stage processing time for project cases (including cases decided without an oral hearing) averaged 178 days and was further broken down by stages: (1) the time from the request for hearing to the receipt of the case in the Social Security Representation Office averaged 49 days; (2) from receipt to assignment

198 *See id.* at 3.
199 *See id.* at 4.
200 *See id.* at 5.
201 *See SSA Representation Project*, *supra* note 196, at 6.
202 *See id.* at 7.
203 *See id.*

to the ALJ averaged twelve days; (3) from assignment to the hearing date averaged fifty-nine days; and (4) from the hearing to date of disposition averaged sixty-eight days. Only the time spent in the second stage (twelve days) was solely attributed to actions by the SSA representatives.[204]

With respect to post hearing development, claimants' representatives requested additional record development after the hearing in 16.6 percent of the represented dispositions, compared to requests by SSA representatives in 5.6 percent of those dispositions.[205] Represented claimants achieved a fully or partially favorable decision in 57.6 percent of the decisions (or in 51.9 percent of the cases when dismissals are included); while unrepresented claimants did not fare as well—49 percent fully or partially favorable decisions (38.5 percent when dismissals are included).[206] Since unrepresented claimants were not opposed by SSA representatives once the case is assigned for hearing, this result is significant for the claimant's ability to recover.[207]

At the Appeals Council ("AC") stage, data for 1983 and 1984 showed that claimants had requested AC review in 72.3 percent of the unfavorable ALJ decisions, but that such review was granted in only 6.7 percent of the cases.[208] Under the Project, SSA representatives could also refer a case for possible "own motion" review by the AC. They did this in 10.2 percent of the favorable decisions.[209] Almost half of these requests (47.8 percent) were granted.[210]

With respect to judicial review in the federal district court, 27 percent of final unfavorable SSA determinations in project cases (AC request of a denial of review, affirmation of an ALJ unfavorable decision, or reversal of an ALJ favorable decision) were appealed in 1983 through September 1984. This was 16 percent lower than the national appeal rate of about 32 percent.[211]

Judging from the figures contained in this report, the SSARP did have some success in freeing the ALJs from having to undertake case development (in all but 2 percent of the cases), but it is harder to identify any overall case processing efficiencies. Also, although SSA representatives only rarely took the initiative to recommend fully favorable decisions before a hearing, on the other hand, neither did they take a particularly aggressive approach to preparing for the hearing. For

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204 *See id.* at 9.

205 *See id.* at 7.

206 *See SSA Representation Project*, *supra* note 196, at 8.

207 *See id.* It should be noted that unrepresented claimants may have weaker cases to present since claimants' attorneys presumably screen cases to decide whether they are worth taking.

208 *See id. at* 10.

209 *See id.*

210 *See id.*

211 *See id.* at 11.

example, they initiated case development primarily from treating physicians rather than from consultant physicians. They also submitted additional evidence at the hearings and sought continuances much less frequently than claimant's counsel. While hearings with both claimant and SSA representatives took longer than hearings involving unrepresented claimants (where no SSA representative was present), represented claimants still fared significantly better than unrepresented claimants notwithstanding the presence of SSA representatives. Finally, although SSA representatives did have significant influence in initiating Appeals Counsel review, the percentage of appeals to the courts by losing claimants in SSARP cases was significantly lower than usual. In sum, while the SSA's own report shows a mixed picture, the statistics disclosed above do not indicate that the government representatives overreached by opposing claimants' counsel in an unduly adversarial way.

C. *The District Court Injunction in* Salling v. Bowen[212]

In November 1982, just one month into the experiment, the SSARP was challenged by seven applicants for Social Security benefits seeking injunctive and declaratory relief. In 1986, in an opinion by Judge Glen M. Williams, the district court in the Western District of Virginia granted the relief and this decision ultimately led to the ending of the project.[213]

One of the court's main concerns was ALJ independence. Judge Williams was concerned about the SSARP's provision for extensive case development by the SSA representative ("SSAR") and late involvement by the ALJ:

> Instead of going to the OHA in Kingsport, the claim file goes directly to the SSARP office and remains under its control until such time as the case is ready for hearing. Only then will the ALJ see the file and have anything to do with the case. The SSARP offices do all the prehearing screening, case docketing, control, selection of documents to be included in the hearing exhibit, preparation of the exhibit list, preparation and release of development requests, contact with the attorney if there is one, and contact with the claimant where there is no attorney and direct intervention on the part of an SSAR where the person is not represented, by communication with the claimant. Indeed, the ALJ who will eventually try the case will not know that he is assigned to the case until the case has been received in the OHA for hearing. . . . This again acts as a halter on the

212 641 F. Supp. 1046 (W.D. Va. 1986).

213 *See id.*

> independence of the ALJs in the handling of cases, and places the file not in the hand of an independent person but in the hands of an advocate of the government.[214]

More critically, Judge Williams also found that the project increased delays in case handling:

> In some instances, the time for hearing a case is three times as long; there is a longer delay between the request for a hearing and the hearing: the number of cases disposed of by the ALJs has decreased; more cases are being referred to the Appeals Council for own-motion reviews by the SSARs, many of which should not have been sent to the Appeals Council for own-motion review: which cumulatively has resulted in great harm to claimants by causing delay in their receipt of benefits.[215]

The court also determined that there were fewer decisions favorable to the claimants in the participating OHA offices, that uniformity in decisionmaking in those offices did not improve, that in at least one case the SSAR failed in his duty to develop the evidence, and that the SSARs improperly referred favorable decisions to the Appeals Council for review.[216]

Finally, the court noted a report on the use of SSARs to present oral argument in twenty-five Social Security appeal cases before a United States Magistrate, stating that "[t]he court appearances by the SSARs is completely outside the scope of the Secretary's regulations for the SSARP and are in violation of the provision that SSARs will not participate in claims beyond the ALJ hearing stage."[217] The court then held that the procedures used in the SSARP were not "fundamentally fair"[218] as required by *Richardson v. Perales*,[219] and violated the three-

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214 *Id.* at 1060.

215 *Id.* at 1060-61.

216 *See id.* at 1062-63 (citing Judge Williams' own decision in *Darnell v. Bowen*, 631 F. Supp 96 (W.D. Va. 1986)).

217 Salling v. Bowen, 641 F. Supp. 1046, 1067 (W.D. Va. 1986). Judge Williams's distrust of SSA's motives in regard to its ALJs is apparent in the following scathing passage:

> This court finds that both the SSARP and the AIP are simply nothing more nor less than an attempt by the bureaucracy to control the independence of the ALJs. Their mission is to employ people who will have control of the files before they go to the ALJ. This program began in an announced purpose of having the representatives develop the case and permit the judge to sit and objectively hear and, if necessary, further develop and decide the case. By giving the file to the SSAR instead of to the ALJ it permits the government a second chance to defeat the claim by new medical evidence without the claimant knowing anything about it. It affords the opportunity for the SSARs to go fishing for additional evidence to support the government's position. In essence, there are persons in the administration who do not trust judges and in particular, do not trust ALJs and who want to destroy their independence, and have used the SSARP and AIP process to aid in their efforts.

Id.

218 *Id.* at 1068.

219 402 U.S. 389, 401 (1971).

pronged test for due process as propounded by *Mathews v. Eldridge*.[220]

D. *Evaluation of the* Salling *Decision*

The government prepared an appeal of *Salling v. Bowen*[221] but decided not to pursue it. So the decision stands unreviewed. However, despite the court's exhaustive review of the program and the context in which it was operating, some of its assumptions should not go unchallenged. One fallacy is the assumption that the favorable cases decided prior to the institution of the SSARP were all correctly decided. For example, the court stated:

> The statistics show that in the five OHAs originally involved in the experiment prior to the adversarial proceeding beginning, about five out of ten claimants had strong enough cases to justify the granting of benefits, however, since the SSARs entered the picture, they have recommended that only one out of ten claimants has a strong enough case. Thus, the SSARs are opposing ninety percent of all the claimants with strong enough cases to win.[222]

The court also suggested that the SSARs were improperly referring cases to the Appeals Council for review:

> The SSARs, using their authority to refer cases to the Appeals Council have adopted an adversary appellate process as shown by the undisputed evidence in this case. They, therefore, refer decisions favorable to the claimant 20 percent of the time according to the statistics which have been presented. . . . Without the SSARs, it is probable that none of these cases would have been before the Appeals Council for its own-motion review.[223]

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220 424 U.S. 319 (1976). The test requires the following:

> [C]onsideration of three distinct factors: [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35. The *Mathews* test, of course, only comes into play where there is a threatened deprivation of life, liberty, or property. Judge Williams finds it "obvious that, in a Social Security context, a person has a property interest to protect." This is certainly true where the government is seeking to take away existing benefits, but is somewhat less obvious where the government is denying an initial claim for benefits. *See, e.g.*, Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999) (claimants did not have property interest in having insurers pay for medical treatments prior to determination that treatments were reasonable and necessary); Dusenbery v. United States, 534 U.S. 161, 167 (2002) (referring to the *Mathews* balancing test as "first conceived in the context of a due process challenge to the adequacy of administrative procedures used to *terminate* Social Security disability benefits") (emphasis added).

221 641 F. Supp. 1046 (W.D. Va. 1986).

222 *Id.* at 1069.

223 *Id.*

These observations seem to assume that the SSAR's role was to be the *claimant's* advocate. However, given that claimants have their own representatives, the SSAR's role was to provide objective advice to the ALJ and to the Appeals Counsel about the need for review. It is hardly surprising that the SSARs did not recommend grants of benefits before hearing at the same rate that benefits were previously granted by the ALJs. Nor should it be surprising that the SSARs recommended Appeals Council review of 20 percent of the cases granted by ALJs. Judge Williams did not find an overall reduction in benefits; what he did find was an improper delay in payments.[224] Delay is a concern, of course, but whether it rises to the level of a due process violation that justifies permanent termination of any type of government representation is a doubtful proposition.[225]

The court's decision is clearly animated by concern over ALJ independence within the SSA. Judge Williams concluded as follows:

> [A]dministrative procedures used in making Social Security disability determinations are a cumbersome 'Rube Goldberg' process at best, which have been further encumbered by a threat to the independence of the ALJs who are the only people in the entire system who are oriented toward the main goal which should be the seeking of truth and ultimate triumph of justice.[226]

This concern was understandable given what became SSA's illegal actions against its ALJs in the 1980's.[227] But those actions have been roundly criticized and the agency is unlikely to repeat them. Moreover, many in the ALJ community now favor government representation in SSA disability cases. [228]

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224 In its brief to the Fourth Circuit, the government, in addition to questioning the judge's statistical analysis, argued that the district court's finding that there had been no drastic reduction in favorable decisions in the Kingsport office was a "telling indicator of the fairness of the project." *See* Reply Brief for Appellant, at 4, Salling v. Bowen, No. 86-2121 (4th Cir. 1986) (appeal withdrawn).

225 It should be noted that the permanent injunction issued by Judge Williams in this case only extends to "any further proceedings using the SSARP or the AIP in any of the remaining five participating OHAs throughout the United States." *Salling*, 641 F. Supp. at 1074. In its brief to the Fourth Circuit, the government argued that since no class was certified in this case, the judge erred in granting relief beyond the one OHA office over which it had jurisdiction. *See* Reply Brief for Appellant, at 2, 16-18, *Salling*, No. 86-2121.

226 *Salling*, 641 F. Supp. at 1073.

227 *See* Ass'n of Admin. Law Judges v. Heckler, 594 F. Supp. 1132 (D.D.C 1984).

228 In testimony to the House Social Security Subcommittee, the President of the Association of Administrative Law Judges stated:

> The past pilot program of the government representation project was not an adequate test of this system. The SSA should implement a new test program for agency representation at the hearing. This pilot project should be implemented in coordination with the claimants' bar, SSA employee organizations, our Association, and other interested groups. The pilot program should address the issues raised by the court in *Salling*. The objective is to establish a hearing process that provides a full and fair hearing for all parties who have an interest in the case.

Our conclusion is that while the *Salling* decision did illuminate some significant problems with the SSARP, it went too far (even in its own terms and time) by holding the use of government counsel to be a violation of due process. As a result, *Salling* should not necessarily constrain a renewed experiment concerning the use of government "advocates," if SSA wishes to attempt one. Of course, any such experiment should draw lessons from the SSARP and avoid some of its pitfalls. For example, such an experiment should not be limited to five locations. Nor should it simply involve inserting SSA attorneys into the process as advocates without adequate orientation and training, and without adjusting other aspects of the process to take account of this change. Also, the use of such attorneys to present oral argument in federal district court against the claimant's award should be avoided as well, since that is clearly an adversary role.

However, if the goals of the SSARP can be met with an alternative, non-adversary approach that involves both procedural changes and changes in the deployment of personnel, most of the objections raised in *Salling* fall away. As discussed later,[229] nonadversary representatives would be trained and directed to work together with, and not in opposition to, claimants and their representatives. Moreover, our nonadversary representative model could be (and should be) used in all cases, including those cases where the claimant is unrepresented. In fact, since building a complete record is one of its main purposes, introducing a nonadversarial representative into the process could be most beneficial when a claimant is unrepresented. Finally, the suggested reform, unlike a re-tooled SSARP, has two crucial benefits to SSA: it can be implemented directly, without the need for experimentation or legislation, and it avoids the costs associated with the applicability of the EAJA to SSA hearings.[230]

> In addition, in the current non-adversarial setting, the SSA ALJ has the legal responsibility to "wear three hats" in each case. The ALJ legally is bound to ensure that all of the claimant's relevant and material evidence is made part of the record and the claimant's interests are protected, to protect the interests of the government in the hearing, and to make a fair decision which is based on the evidence in the record. Additionally, the judge must take care to not become overly protective of the interest of the government for fear that the case will be reversed on appeal on a claim of bias against the claimant. The inherent conflict in all of these roles is patent and would be resolved by having the government represented at the hearing.

Hearing Series on Social Security Disability Programs' Challenges and Opportunities: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means, 107th Cong. (2002) (statement of the Hon. Ronald G. Bernoski, Administrative Law Judge, Office of Hearings and Appeals, Social Security Administration, Milwaukee, Wisconsin, and President, Association of Administrative Law Judges, Milwaukee, Wisconsin). At least some ALJs and many SSA Regional Counsels view this question differently. *See infra* Part V.

229 *See infra* Part V.A.

230 *See supra* Part III.C.3.

V. ISOLATING THE PROBLEM: INCOMPLETE AND EVER-CHANGING RECORD FOR DECISION

Based on our review of the current process, we believe that one fundamental problem has led the SSAB and others to raise questions concerning government representation and closing the record: *disability decisions, including, but not limited to, those made by ALJs following an administrative hearing, are made on the basis of incomplete and ever-changing evidentiary records.* In this part we analyze this issue based upon our own and other informed commentary. In the final part, we propose recommendations to remedy this central problem.

It is apparent from the remarks of representatives of two key groups present at the June 2002 House Subcommittee hearings—claimant advocates on the one hand and SSA and OHA personnel, including ALJs, on the other—that most claimant advocates oppose government representation and closing the record while some SSA officials, and some ALJs in particular, favor both initiatives.[231] However, when questioned more specifically on these issues during interviews with the authors, representatives of these same two groups of interested parties (a number of whom also testified earlier at the Subcommittee hearing) presented more qualified views.[232]

To be sure, the advocacy group representatives were uniformly opposed to government representation, seeing such an effort as inevitably becoming adversarial and citing the problems with the 1980's experiment. Although most of the ALJs interviewed favored the concept of government representation, other SSA personnel expressed doubts about SSA adopting an adversarial position on claims before a full record had been developed and a decision reached at the administrative hearing. Moreover, many SSA personnel pointed out the high cost of implementing a full-blown government representative program, both financially and politically. However, when asked to consider the question functionally—what would someone in the role of government representative (or some other, similar role) add to the process?—virtually all of the persons interviewed pointed to the need for better development of the evidentiary record. They also agreed on what "better" means in this context: obtaining all relevant medical and vocational information from the appropriate sources, and doing so as soon in the process as possible. When asked what sort of a person is needed to fill that role, there were various suggestions, but an advocate

231 These remarks are summarized in Appendix III to our formal report to the SSAB, *available at* http://www.ssab.gov/blochlubbersverkuil.pdf. *See supra* note *.

232 Summaries of these interviews can be found at Appendix I to our formal report to the SSAB. *Id.*

for the government's position was far down on the list.

As for closing the record, the difference in views among the people interviewed depended to a large extent on their confidence in the record development process. A minority of the ALJs interviewed suggested that even under current circumstances the record could be closed at the DDS level (after reconsideration), so that ALJs could act more like appellate judges. This is also the position of the National Association of Disability Examiners ("NADE"), which has urged that the process be changed so that claimants receive a medical hearing at the DDS level followed by a "legal review to ensure that the medical decision correctly followed the laws."[233] Everyone else agreed that the time to close the record was ordinarily after the administrative hearing was over and before the ALJ makes a decision. Those who were the most confident about the record development process were more likely to suggest a "bright line" cut-off. Those more concerned about the quality of the record, even after the hearing has been held, were more likely to suggest some sort of safety valve, such as a "good cause" requirement for submitting additional evidence along the lines of the requirement for submitting additional evidence at the district court.[234]

The persons interviewed disagreed as to whether the current attorney's fee structure acts as a disincentive for claimant lawyers to submit all evidence in a timely manner.[235] Claimant lawyers insist that they develop their cases as quickly as they can, and point to administrative problems (such as late availability of claim files and last-minute scheduling of hearings) as contributing to any delay. But some ALJs go so far as to suggest that claimant lawyers withhold evidence at the ALJ hearing and wait to submit it to the Appeals Council in order to increase past-due benefits and, as a result, their fees. There is no more than anecdotal evidence that claimant lawyers delay the process deliberately, and the authors have concluded that this practice is not a systemic problem.[236] Nonetheless, a virtue of establishing a reasonable

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233 *Hearing Series on Social Security Disability Programs' Challenges and Opportunities: Hearings Before the Subcommittee on Social Security of the House Committee on Ways and Means*, 107th Cong. (2002) (statement of Jeffrey H. Price President, National Association of Disability Examiners, Raleigh, North Carolina).

234 *See* LEWIN REPORT, *supra* note 8, at 169, stating the following:

> Although [the] argument for closing the record has merit, given the length of the initial determination and appeals process, it seems very inequitable to only let applicants who have new evidence use it if they return to the beginning and start again. If the process were much faster, the inequity of a closed process would not be such an issue. SSA could also consider a limited open record policy, in which new evidence is only accepted if it meets standards that have been designed to encourage submission of evidence earlier in the process.

Id.

235 Since fee awards are limited to a percentage of back pay recoveries, the longer the process takes the greater the amount of fees that can be earned. *See supra* Part III.C.1.

236 *See id.* at 23 (reporting that some judges and others had made allegations to this effect).

rule for closing the record at the ALJ hearing level is that it would help to reduce the potential for "gaming" the system.

If the key problem is an often-incomplete record, the question becomes how to overcome that problem. The goal should be to get to the point with record development where closing the record becomes a non-controversial matter. Closing the record after the ALJ hearing is controversial mainly because the current system for developing the record up to that point does not do the job. Whether introducing a government representative should be part of the record closing solution also depends on how such a position might be structured.

A. *Factors Related to Government Representation*

One of the most consistently stated arguments in favor of introducing a government representative is that the process has become "too one-sided" in favor of claimants.[237] The most important consequence, the argument goes, is that the record becomes imbalanced; claimants have their representatives, who look out for their interests and fill the record with information favorable to their claims, while SSA sits passively by and accepts the results. SSA has no direct voice at the hearing, and to the extent that its interests are looked after by the ALJs, their ability to do that effectively is hindered by their three-hat role which restrains them from acting on behalf of the government.[238] Claimant representatives do not dispute the first part of this characterization—that they look out for their client's interests and seek evidence to support their claims—but see it instead as an indication that they are doing their job well.[239] Claimant representatives also acknowledge the lack of corresponding development by SSA in many cases, but they see this more as an extension of the poor development practices at the DDS level than as a matter of competitive advantage. But regardless of how it is characterized, the result is that ALJs must

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237 *See, e.g.*, Statement of the Hon. Hal Daub Chairman, *supra* note 23.

238 *See* Richardson v. Perales, 402 U.S. 389, 410 (1971) (defining the "three hat" role). Indeed, some ALJs interviewed expressed the view that the "three hat" role has become increasingly unbalanced by the presence of claimant representatives. In this view, the presence of a government representative "rebalances" the decision system and allows the ALJ to use the most important of his or her three hats—impartial decider. *See also* LEWIN REPORT, *supra* note 8, at 23 (suggesting that under an adversary system, "[t]he adjudicator's role is limited to conducting a fair process and judging the relative merits of the arguments. The adjudicator is not distracted by irrelevant information and need not have extensive programmatic expertise; the adjudicator specializes in judging.").

239 Indeed, many observers have noted that the most important "lawyering" in a disability benefits case is developing the evidentiary record. *See, e.g.*, William B. Popkin, *The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs*, 62 CORNELL L. REV. 989 (1977).

either take up the slack themselves or decide the claim on less than a full and complete record. Some ALJs assume this record-development responsibility regularly and without objection, as many courts have indicated they must,[240] but this does not seem to be the optimal solution. With one hat gone (representation of the claimant), the ALJ is constrained from wearing the second (representing the government) for fear of transforming the third hat (objective decider) into a cocked hat. The objectivity of ALJs is always subject to challenge.[241] It is too important an asset to be jeopardized and the entire system benefits from reinforcing it.

Assuming that the "imbalance" problem should not be handed off to the ALJs, the question becomes: what should be done about it—and by whom? It is not at all clear that inserting an adversarial SSA counterpart to the claimant representative is the best answer. SSA and claimants are in different positions and have different roles in the disability adjudication process. SSA is not just the agency for adjudicating Social Security benefits; while the claim is pending in the administrative process, it is also Congress' partner in carrying out the social goals of the Social Security Act.[242] As such, the SSA does not need a lawyer to represent it in the traditional (i.e., adversary) sense. Disability decision making is simply not the product of an adversary process. Even claimant representatives, most of whom are lawyers, are subject to special rules governing representation that take into account the unique aspects of public benefits practice.[243] The roles of a claimant's representative as well as of any SSA representative are both affected by the special nature of the Social Security application and appeals process. This leads us to conclude that Congress was correct when it originally cast the roles of SSA and claimant representatives as complementary and largely cooperative.[244] SSA needs better

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240 *See Richardson*, 402 U.S. at 410; Henrie v. U.S. Dept. of Health & Human Services, 13 F.3d 359, 360-61 (10th Cir. 1993) ("ALJ has a basic obligation in every social security case to ensure that an adequate record is developed during the disability hearing consistent with the issues.").

241 To the extent that district courts view the SSA disability system with a jaundiced eye, they do so because of apparent qualms about the overall objectivity of the SSA decision system, despite the presence of ALJs. *See* Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 707 (2002) (comparing high reversal rates in SSA cases despite use of "substantial evidence" test with low reversal rate in Freedom of Information Act ("FOIA") cases despite use of de novo standard of review).

242 Once a claim moves on to judicial review in the federal courts, SSA is in a more traditional adversary position vis-à-vis a claimant appealing a final agency decision denying benefits. Indeed, at that point SSA is represented by the local US Attorney and the proceedings are essentially adversarial.

243 The rules "set forth certain affirmative duties and prohibited actions which shall govern the relationship between the representative and the Agency, including matters involving [SSA's] administrative procedures and fee collections." 20 C.F.R. §§ 404.1740, 416.1540 (2003).

244 *See generally* Ronald S. Gilson & Robert H. Mnookin, *Disputing Through Agents:*

representation, but that representation need not be adversarial in the traditional sense in order to effectuate the goals of the system.[245] In our view, non-adversarial adjudication need not be an oxymoron.

Moreover, inserting an adversary SSA representative—whether a lawyer or nonlawyer—into disability adjudications would not address directly the most pressing functional needs of the process. The main deficiency of the disability adjudication process is the lack of full and timely development of the evidentiary record. Although the traditional adversary system may ultimately produce a supportable version of the "truth" at trial (or for pre-trial settlement), producing a full evidentiary record is not the system's most important value.[246] By contrast, most of the all-important record development work on a Social Security disability claim—obtaining existing medical and vocational records, measuring existing information against alleged impairments and applicable eligibility criteria, ordering additional medical and/or vocational evaluations—are essentially bureaucratic neutral tasks that may not benefit from the contested nature of the adversarial setting. Potentially, both claimant and SSA interests could be served better by introducing a nonadversarial governmental representative charged with the responsibility to assure the development of a timely, full, and fair record which would facilitate an objective decision by the ALJ.[247] As explained more fully below, we have chosen to call this representative a "counselor."

A substantial number of proposals have been advanced that aim directly at the record development problem in the disability adjudication process.[248] Some focus on existing administrative practices and

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Cooperation and Conflict Between Lawyers in Litigation, 94 COLUM. L. REV. 509 (1994); Rachel Croson & Robert H. Mnookin, *Does Disputing Through Agents Enhance Cooperation? Experimental Evidence*, 26 J. LEGAL STUD. 331 (1997) (urging non-zero sum outcomes). *See also* ROBERT WRIGHT, NONZERO: THE LOGIC OF HUMAN DESTINY (2000) (contending that society progresses to the extent it acts cooperatively).

245 *See generally* Frank S. Bloch, *Representation and Advocacy at Non-Adversarial Hearings: The Need for Non-Adversary Representatives at Social Security Hearings*, 59 WASH. U.L.Q. 349 (1981). Of course, it is one thing to declare a representative "nonadversarial" and another to have him or her perform that way. To the extent these representatives are attorneys, they may have a professional inclination to be adversarial. On the other hand, a statutory mission that eschews adversariness and a regulatory culture that ensures nonadversariness presents an opportunity to carve out a category of representatives that are truly helpful and impartial.

246 The adversary system often creates records that obfuscate as well as illuminate, as the discovery process in civil litigation shows. This is one reason why its role is best realized in private litigation, not in the government benefits context. *See* Paul R. Verkuil, *The Adversary System, Liberalism and Beyond*, 60 SOUNDINGS 54 (1977) (distinguishing private from public litigation on this basis).

247 This point is developed in Bloch, *supra* note 245, at 400-01. *Cf.* JERRY L. MASHAW, ET AL., *supra* note 27, at 97-98 (discussing the need for government representation at ALJ hearings and concluding: "If 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 the witnesses at the hearing.").

248 *See, e.g.*, ACUS Recommendations 78-2 and 90-4, discussed *supra* Part I.B.

procedures while others suggest deployment or redeployment of personnel—all with the idea of improving SSA's performance relative to developing the record for decision. One of these in particular—the SSA's own Senior Attorney Project, which received support even from groups generally opposed to a resurrection of the government representation experiment—also lends support to our SSA Counselor recommendations, and is consistent with the concept of non-adversarial representation.

A number of the important proposals in this area were made earlier by ACUS.[249] For example, ACUS urged SSA to require that the DDSs communicate clearly and fully the rationale of their disability decisions and the evidence on which they are based. ACUS also recommended expanded use of prehearing conferences to frame the issues involved in the ALJ hearing, identify matters not in dispute, determine whether subpoenas might be necessary, consider witnesses that might need to be called, and also decide appropriate cases favorable without hearings.[250] The SSA Counselor could orchestrate all of these functions in advance of the ALJ hearing with the cooperation of the DDS and with the participation of the ALJ, as appropriate. Other ACUS recommendations urged SSA to develop specific guidelines for transmitting key medical information, such as the data necessary to assess residual functional capacity, and to provide adequate funding to pay for requested medical records, including but not limited to those from claimants' treating sources.[251]

Finally, we note that even though the *Salling* case went too far, the results of the 1980's experiment were mixed, at best, and that has left a negative perception. Were SSA to introduce a government advocate into the process, it would first have to undertake another carefully designed experiment with due regard to the lessons learned in the first attempt. This would be a difficult task (but not an insurmountable one); nevertheless, the inevitable challenges by disappointed claimants who find themselves participants in the experiment (or affected by it) might stymie and even derail it.

Given the potential downsides of experimenting with the adversary process in this setting and our judgment that such a step would fail to advance the crucial need to improve the record development process, we conclude that the best SSA "representative" would be non-adversarial—a person who could help provide the ALJ with a timely

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249 For an overview of the proposals in this area, see *supra* Part I.B.

250 *See* Social Security Disability Program Appeals Process: Supplementary Recommendation, 55 Fed. Reg. 34, 213, ¶¶ 2-3 (Aug. 22, 1990).

251 *See* Improved Use of Medical Personnel in Social Security Disability Determinations, ¶ 5(c), *available at* www.law.fsu.edu/library/admin/acus/3058910.html, *discussed in* 55 Fed. Reg. 34,212, ¶ 5 (Aug. 22, 1990).

and complete record for decision while not triggering a host of collateral issues.[252]

B. *Factors Related to Closing the Record*

Once steps like those discussed above are taken to allow the ALJ to decide cases based on a full and complete record, then there should be no hardship in closing the record after the hearing (or at a later designated time set by the ALJ). Claimants' representatives can play their part along with the Counselor to produce everything that is needed for decision in a timely fashion. Any perverse incentives to withhold evidence so as to lengthen the case and increase the amount of fees would also be reduced. Still, we recognize that occasionally key information—key to both SSA and the claimant in their shared desire to produce a correct decision—cannot always be obtained in time. In such situations, a "good cause" exception for reopening the record before the ALJ should be available as a safety valve.[253]

VI. SOLVING THE PROBLEM AND RECOMMENDATIONS

The key problem with the current disability adjudication process is the prevalence of incomplete and ever-changing evidentiary records. Therefore, our recommendations are aimed directly at improving the record for disability decisions. Because our study began with the goal of examining the options of introducing some form of government representative and closing the record at a pre-ordained time,[254] our recommendations address those options directly along with other issues raised by our research. We have chosen not to propose a revival of the experimental program involving a government representative as an advocate. Instead our recommendations related to government representation introduce a somewhat different concept: a "Counselor" charged with the responsibility to take the lead in developing as complete a record as possible for decision by the administrative law

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252 Of course, merely labeling a representative nonadversarial does not make him or her so. The rules of engagement must make the role clear and limited.

253 This is the standard used in the district courts for ordering a remand. *See* 42 U.S.C. § 405(g) (2003). *See also supra* text accompanying note 145. One difficulty with proposing changes in the rules for closing the record after the ALJ hearing is that any such changes depend on the status and purpose of the Appeals Council. What is clear is that the current rule of allowing the submission of any "new and material" evidence to the Appeal Council, coupled with often-deficient record development before and at the ALJ hearing, results in many time-consuming remands back to the ALJ with little use of Council expertise.

254 As noted earlier, this article is based on a report the authors submitted to the SSAB; as part of its charge, the SSAB asked that these questions be addressed. *See supra* note *.

judge.

A. *Overview of Recommendations*

Our key recommendation is that SSA concentrate its efforts on improving the record for decision at ALJ hearings. We believe that the best way to achieve this goal is by introducing a nonadversary Counselor into the disability adjudication process whose central role would be to monitor the process of developing the evidentiary record and to work closely with all of the key actors—the claimant (and the claimant's representative, if there is one), the ALJ, and SSA (most likely, through DDS)—in order to identify any gaps in the record and to fill them as quickly and efficiently as possible. These Counselors would remove much of the development work from the ALJ, including assuring that the claimant's and SSA's (or DDS's) positions are fully supported, and would serve a much-needed administrative liaison function between the DDS and OHA.

We also recommend that the Counselors be given the resources and authority necessary to move claims quickly, especially those where benefits can be granted without a full administrative hearing.[255] Consistent with the concept of nonadversarial representation, we believe that SSA Counselors need not be lawyers. Candidates for these positions can be drawn from staff working already in the disability determination process (at SSA, DDS, OHA, or the Appeals Council) or from the outside. Most importantly, they must be qualified and trained to assure that they understand not only the relevant medical, vocational, and legal issues involved in Social Security disability adjudications, but also to appreciate their unique role in the disability determination process.

B. *Recommendations Relating to Development of a Complete Record for Decision by the Administrative Law Judge*

1. SSA should concentrate its efforts in the disability adjudication process on improving the record for decisions.
2. SSA should consider implementing administrative and personnel reforms aimed at identifying and obtaining key information as quickly as possible, such as:

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255 We would anticipate that counselors would approach the ALJs with requests that a claimant be paid without the need for a hearing where the evidence is clearly in support of the claim.

a. Requiring that the DDSs communicate clearly and fully the rationale of their disability decisions and the evidence on which they are based.
b. Developing specific guidelines for transmitting key medical information, such as the data necessary to assess residual functional capacity.
c. Providing adequate funding to pay for requested medical records, including but not limited to those from claimants' treating sources.
d. Encouraging ALJs to use their subpoena power when needed to obtain relevant information, and providing the DDSs with comparable mechanisms for enforcing similar requests.
e. Requiring DDSs and OHA to make the existing record for appealed claims available to claimants and their representatives as quickly as possible, and requiring OHA to set the date for ALJ hearings at least two months in advance.

3. SSA should consider creating a new administrative position, called a "Counselor," with the express mandate of overseeing and facilitating the development of the evidentiary record for decision.[256] As part of this process, the Counselor position should have the following characteristics and responsibilities:
   a. It should be charged with developing a full and complete record as quickly as possible, in cooperation with claimants (and their representatives), DDS, OHA, and other SSA personnel.
   b. It should have direct access to key DDS personnel in order to question and clarify the DDS's rationale for its disability decisions.
   c. It should have independent authority to obtain information

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256 Commissioner Barnhart has recently proposed the creation of a "Reviewing Official" ("RO") position which builds upon the Counselor position the authors recommend here, albeit with some differences (e.g., the RO would have to be an attorney). She describes the RO position as follows:

> A Reviewing Official (RO) position would be created to evaluate claims at the next stage of the process. If a claimant files a request for review of the DDS determination, the claim would be reviewed by an SSA Reviewing Official. The RO, who would be an attorney, would be authorized to issue an allowance decision or to concur in the DDS denial of the claim. If the claim is not allowed by the RO, the RO will prepare either a Recommended Disallowance or a Pre-Hearing Report. A Recommended Disallowance would be prepared if the RO believes that evidence in the record shows that the claimant is ineligible for benefits. It would set forth in detail the reasons the claim should be denied. A Pre-Hearing Report would be prepared if the RO believes the evidence in the record is insufficient to show that the claimant is eligible for benefits but also fails to show that the claimant is ineligible for benefits. The report would outline the evidence needed to fully support the claim.

Barnhart Statement, *supra* note 5.

for the record, including access to any available funds and enforcement mechanisms.

d. It should have a formal role, either independently or in cooperation with ALJs and other OHA staff, to narrow and resolve particular issues and, when appropriate, to recommend to an ALJ a fully favorable, on-the-record decision.

e. It should be designated nonadversarial, even if attorneys fill some of the positions.

C. *Recommendations Related to Closing the Record*

In connection with taking the steps called for in Part A of these Recommendations, SSA should revise its regulations to close the evidentiary record after the ALJ hearing,[257] subject to the following qualifications:

1. ALJs may extend the time to submit evidence and/or written argument for a reasonable period after the hearing and before deciding the claim.
2. Claimants may request that the record before the ALJ be reopened for the submission of new and material evidence and a new decision, if the claimant demonstrates good cause for failing to present the evidence before the record closed and if the request is made within one year after the ALJ issued the decision on the claim or before a decision is reached on appeal by the Appeals Council, whichever is later.

D. *Implementing these Recommendations*

The above recommendations should be implemented as soon as feasible. This can be done by regulation or other administrative action; no legislation is required. Moreover, the SSA Counselor position can be created without need for experimentation.[258] The regulations should address closing the record at the ALJ stage and articulate a standard for a good cause exception drawn from the current standard at the district court.[259] The regulations relating to the Counselor function should also

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257 Commissioner Barnhart has recently proposed closing the record after the ALJ hearing. *See id.*

258 If SSA were to initiate a renewed program for use of government "advocates," it should do so only after an experiment that draws lessons from the SSARP. *See supra* Part IV (discussing this point).

259 *See* 42 U.S.C. § 405(g) (2003).

include a code of conduct and other rules that emphasize the nonadversarial nature of the position.[260]

260 The regulations, while procedural in nature and thereby exempt from notice and comment, 5 U.S.C. § 553(b)(A) (2003), might still benefit from comments from the affected claimant community.