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Michael Boyd

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# Social Security's Compassionate Allowances: Innovative Initiative or Deceptive Smokescreen

By Michael Boyd\*

## I. INTRODUCTION

Eric De La Cruz is a victim, yet hopefully, an icon of change for an inefficient, government-run administration.<sup>1</sup> Eric lost his life awaiting Social Security disability benefits after a lengthy battle with a severe case of dilated cardiomyopathy, causing his heart to become enlarged and weak.<sup>2</sup> Eric was in his early twenties when he was originally diagnosed with the disease.<sup>3</sup> Because Eric was not able to receive health care insurance through his work or able to purchase it privately due to his pre-existing condition, he sought and applied for

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\*Michael Boyd is a third year student and third Boyd family member to attend Pepperdine University School of Law. Michael graduated from the University of San Diego California with a Bachelor of Science in Economics. He is grateful for the tolerant ears of his family members who provided much needed support and encouragement along the way. Michael plans to pursue a career in criminal law following graduation.

<sup>1</sup> Tara Parker-Pope, *A New Heart, Tangled in Red Tape*, N.Y. TIMES, Aug. 31, 2009, available at [http://www.nytimes.com/2009/09/01/health/01well.html?\\_r=2](http://www.nytimes.com/2009/09/01/health/01well.html?_r=2).

<sup>2</sup> *Id.* Dilated cardiomyopathy is one of four of the main types of cardiomyopathy along with hypertrophic cardiomyopathy, restrictive cardiomyopathy, and arrhythmogenic right ventricular dysplasia. *What is Cardiomyopathy?*, NATIONAL INSTITUTES OF HEALTH, Dec. 2008, [http://www.nhlbi.nih.gov/health/dci/Diseases/cm/cm\\_what.html](http://www.nhlbi.nih.gov/health/dci/Diseases/cm/cm_what.html) (last visited Dec. 20, 2010). Outlook for individuals suffering from dilated cardiomyopathy can differ; some people exhibit no signs or symptoms and treatment is not necessary, while disease quickly develops in others and heart failure and other complications are inevitable absent treatment. *Id.* Treatment for dilated cardiomyopathy, if successful, can control symptoms, preventing the disease from getting worse. *Id.*

<sup>3</sup> PARKER-POPE, *supra* note 1.

Social Security disability benefits.<sup>4</sup> He applied twice and was denied twice.<sup>5</sup> Eric appealed and had a hearing set for spring of 2010.<sup>6</sup> Had either of his two applications been successful or delays shortened, he would have been entitled to appropriate coverage under Medicare, which, as experts claimed, done in a timely manner, would have likely saved his life.<sup>7</sup> But as it stood, Eric was just another name in an ever increasing application stack.<sup>8</sup> Eric De La Cruz died at the age of thirty one on July 4, 2009.<sup>9</sup>

It is particularly effective, yet unjust, to criticize an agency's results when it is blatantly hampered by insufficient and limited resources and is in the business of saving and preserving life.<sup>10</sup>

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<sup>4</sup> *Id.* Eric did also apply to his state's Medicaid program in Nevada and was accepted. *Id.* However, his qualification was due to his financial situation and not based on physical condition. *Id.* Eric was not covered through Nevada's Medicaid program for his necessary heart transplant due to his age (Nevada's Medicaid program covered heart transplants for individuals twenty or younger). *Id.*

<sup>5</sup> PARKER-POPE, *supra* note 1.

<sup>6</sup> *Id.* A recent government hearing has placed the average wait for a Social Security disability appeal hearing at 500 days. *Congressmen Tanner and McDermott Announce a Joint Hearing on Eliminating the Social Security Disability Backlog*, HOUSE WAYS & MEANS COMMITTEE, Mar. 17, 2009, <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=7604> (last visited Dec. 20, 2010). This number is not inclusive of the standard three to five months it takes for an initial decision prior to requesting a hearing. *Frequently Asked Questions #10*, SOCIAL SECURITY ADMINISTRATION, [http://ssa-custhelp.ssa.gov/cgi-bin/ssa.cfg/php/enduser/std\\_alp.php?p\\_page=1&p\\_cv=1.105&p\\_pv=&p\\_prods=&p\\_cats=105](http://ssa-custhelp.ssa.gov/cgi-bin/ssa.cfg/php/enduser/std_alp.php?p_page=1&p_cv=1.105&p_pv=&p_prods=&p_cats=105) (last visited Dec. 20, 2010).

<sup>7</sup> PARKER-POPE, *supra* note 1.

<sup>8</sup> TANNER, *supra* note 6. As of March 2009, the number of applicants awaiting the initial decision has reached unprecedented numbers, hovering around 1.3 million. *Id.* The number of applicants awaiting their appeal hearing has more than doubled since 2000, from 310,000 to over 765,000. *Id.*

<sup>9</sup> PARKER-POPE, *supra* note 1.

<sup>10</sup> The federal government staffs 1,350 judges to hear Social Security disability claims across the country. Dan Herbeck, *Take it From the Judges: Disability Cases too Drawn Out*, BUFFALO NEWS, Oct. 9, 2009, available at <http://www.buffalonews.com/cityregion/story/822517.html>. Each judge will typically, in a year, hear 500 cases and is compensated between \$120,000 to \$165,000 yearly. *Id.* As of 2007, the Office of Disability Adjudication and Review has 1 national headquarters (located in Falls Church, Virginia), 10 regional offices, 141 hearing offices, and 5 satellite offices. *SSA Administrative Data: Offices and Staff*, SOCIAL SECURITY ADMINISTRATION,

Given its financial situation, the Social Security disability division is forced to make priority, judgment calls. It is imperative that these decisions be scrutinized, as the potential effects, as shown above, can be life altering.

On October 27, 2008, Michael J. Astrue, Commissioner of Social Security, announced a major overhaul in the processing of Social Security disability applications.<sup>11</sup> The proposed "Compassionate Allowances" provide a "way to expedite the processing of disability claims for applicants whose medical conditions are so severe that their conditions obviously meet Social Security's standards."<sup>12</sup> These Compassionate Allowances are a judgment call. The focus of this comment is not meant to address health care reform. The focus is to present, from a critical perspective, the success and shortcomings of this overhaul, suggesting additional provisions throughout the system as appropriate. Part II provides the historical background and development of Social Security and Social Security disability.<sup>13</sup> Part III addresses the mundane intricacies associated in filing a Social Security disability application and the appeals

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<http://www.ssa.gov/policy/docs/statcomps/supplement/2008/2f1-2f3.pdf> (last visited Dec. 20, 2010). Crunching the numbers, if 1,350 judges hear an estimated 500 cases a year, judges will have resolved 675,000 cases. While this is an impressive number, it is worth noting the current backlog of 765,000 cases awaiting a hearing greatly outnumber a year's productivity of these judges. Hence, one can anticipate at least a year's wait before a hearing. This also fails to take into account "check up" hearings that are scheduled after an applicant has received disability benefits for a period of time. Also, according to Social Security's website, "the chances that you will become disabled probably are greater than you realize. Studies show that a 20-year-old worker has a 3 in 10 chance of becoming disabled before reaching retirement age." *SSA Publication No. 05-10029*, SOCIAL SECURITY ADMINISTRATION, Aug. 2009, <http://www.ssa.gov/pubs/10029.pdf> (last visited Dec. 20, 2010). Given these statistics, and along with an increasing United States population (net gain of a person every 11 seconds), financial resources will continue to be stretched to meet the current disability claims into the future. *U.S. POPClock Projection*, UNITED STATES CENSUS, <http://www.census.gov/population/www/popclockus.html> (last visited Dec. 20, 2010).

<sup>11</sup> *Social Security Announces Nationwide Launch of Compassionate Allowances*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/pressoffice/pr/compassionate-allowances-1008-pr.htm> (last visited Dec. 20, 2010).

<sup>12</sup> *Id.*

<sup>13</sup> See *infra* notes 18-35 and accompanying text.

process.<sup>14</sup> Part IV introduces the Compassionate Allowances initiative.<sup>15</sup> Part V provides critique of the current system, its problems, and proposed solutions.<sup>16</sup> Part VI concludes the comment.<sup>17</sup>

## II. HISTORICAL BACKGROUND

Similar to the establishment of the Patriot Act after the events of September 11th, the emergence of Social Security came in response to a catastrophic historic event: the great Stock Market Crash & Great Depression of October 1929.<sup>18</sup> Prior to the founding of Social Security, economic security took various other forms in America: company, state, and civil war pensions, government-operated poorhouses, miscellaneous charities, and, most notable, the family unit.<sup>19</sup> Dire circumstances, millions of unemployed workers,

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<sup>14</sup> See *infra* notes 36-119 and accompanying text.

<sup>15</sup> See *infra* notes 120-206 and accompanying text.

<sup>16</sup> See *infra* notes 207-269 and accompanying text.

<sup>17</sup> See *infra* notes 270-274 and accompanying text.

<sup>18</sup> *Historical Background and Development of Social Security*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/history/briefhistory3.html> (last visited Dec. 20, 2010). Demonstrating the magnitude of the stock market crash, within three months of Oct 24, 1929, it had lost 40% of its value. *Id.* Twenty-six billion dollars had vanished seemingly overnight. *Id.* Today's equivalent, factoring in inflation over the years, would be 328 billion dollars. *Inflation Calculator*, UNITED STATES BUREAU OF LABOR STATISTICS, <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited Dec. 20, 2010). Moreover, the Gross National Product was cut nearly in half, from \$105 billion in 1929 to \$55 billion in 1932. HISTORICAL BACKGROUND, *supra* note 18. Likewise, aggregate wages to workers decreased from \$50 billion to \$30 billion in 1932. *Id.*

<sup>19</sup> HISTORICAL BACKGROUND, *supra* note 18. In the aftermath of the Civil War, the United States faced its highest percentage of disabled workers and widows. *Id.* The United States government implemented Civil War pensions which provided financial assistance to these specific groups. *Id.* These military pensions were a significant portion of the federal budget, accounting for 37% in 1894. *Id.* In fact, at the time, in 1893, the government's \$165 million expenditure was the single biggest expenditure in history of the federal government. *Id.* Company pensions, another source of economic security, were not as prevalent throughout the country at the time. HISTORICAL BACKGROUND, *supra* note 18. Even as late as 1932, company pensions were only available to about 15% of the working population and only 5% of the elderly were currently receiving one. *Id.* Another problem was that, during this time, employers would always be given the

thousands of failed banks and businesses, and the vulnerable elderly, all created the need for this matter to be addressed.<sup>20</sup> After much debate over the means,<sup>21</sup> the Social Security Act was signed into law by President Roosevelt on August 14, 1935.<sup>22</sup> The effect of the legislation was that it provided workers age sixty-five or older with a streaming income following retirement.<sup>23</sup> Though successful in many regards, the Social Security Act of 1935 is also seen as incomplete due to its failure to address medical and disability coverage.<sup>24</sup> It would be almost twenty years later, in 1954, that disability coverage would even be addressed in context of the Social Security Act of 1935.<sup>25</sup>

The Social Security Amendments of 1954 would be the first to address the shortcomings of the original act.<sup>26</sup> President Eisenhower

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last say as to whether an employee, who worked decades for the company, would actually be receiving a pension or not. *Id.* Government-operated poorhouses were a last resort of sorts. *Id.* In addition, residents in a poorhouse were sometimes forced to forfeit personal property, give up of voting rights, and wear specifically designed clothes with a large "P" symbol to announce his or her status to the world. *Id.* Given the bleak economic security that existed at the time, the advent of Social Security is of no surprise.

<sup>20</sup> HISTORICAL BACKGROUND, *supra* note 18.

<sup>21</sup> Some of the competing programs and ideas at the time included: Huey Long's "Share our Wealth" program, the Townsend movement, "E-p-i-c" plan, Ham & Eggs, Bigelow Plan, General Welfare Federation of America, and Technocracy. *Id.* The most popular of these was Huey Long's "Share our Wealth" program with 7.7 million members countrywide in 1935. *Id.* Huey Long, former governor of Louisiana and elected senator, was a radical populist who wanted to bring Robin Hood, the famous fictional character, to life. *Id.* Long sought to reform economic security by taking from the rich and giving to the poor. *Id.* Long urged the federal government to guarantee a flat \$5,000 a year for each family in the nation to provide for necessities of life: food, housing, a job, a radio, and an automobile. HISTORICAL BACKGROUND, *supra* note 18.

<sup>22</sup> *Id.* President Roosevelt's arrival into office truly marked a new model of thinking. It was said that former President Hoover was presented with three basic options: "do nothing; rely on voluntary charity; and expand welfare benefits for those hardest hit by the Depression." *Id.* President Roosevelt introduced the new concept of "social insurance." *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> HISTORICAL BACKGROUND, *supra* note 18.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

signed into law a “disability freeze.”<sup>27</sup> Because Social Security benefits correspond with a worker’s lifetime earnings and subsequent payment into Social Security, this “disability freeze” prevented disabled workers from being discriminated against due to their inability to work during a certain time period.<sup>28</sup> However, no direct financial assistance was available during these inactive times.<sup>29</sup> Consequentially, the law was modified two years later, on August 1, 1956, to allow disabled workers aged fifty to sixty-four and disabled adults and children to receive disability benefits.<sup>30</sup> Four years later, in September 1960, Social Security disability benefits were extended when President Eisenhower amended the rules, allowing disabled workers of any age and their dependents to receive assistance.<sup>31</sup> The final widespread modifications of Social Security disability occurred with the 1980 and 1983 amendments.<sup>32</sup> In 1980, the Social Security Administration (hereinafter known as “SSA” or “the administration”) was required to begin conducting periodic reviews of the eligibility

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<sup>27</sup> *Id.* The general rationale behind implementing a disability freeze deals with the inherent consequences of a period of disability. *Disability “Freeze,”* SOCIAL SECURITY ADMINISTRATION, [http://ssa-custhelp.ssa.gov/cgi-bin/ssa.cfg/php/enduser/std\\_adp.php?p\\_faaid=428&p\\_created=973093412](http://ssa-custhelp.ssa.gov/cgi-bin/ssa.cfg/php/enduser/std_adp.php?p_faaid=428&p_created=973093412) (last updated Oct. 22, 2010)(last visited Dec. 20, 2010). It is reasonably presumed that during a period of disability one cannot maintain their regular stream of income. *Id.* In fact, a disabled worker may not even have a source of income. *Id.* These periods of disability are generally not counted against an applicant’s required number of work credits to receive benefits. *Id.* Today, a “disability freeze” taken into account could lead to higher monthly benefit payments if applicable. *Id.*

<sup>28</sup> HISTORICAL BACKGROUND, *supra* note 18.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* By 1960, Social Security disability had paid out over 44.72 million dollars monthly to 559,000 people. *Id.* The average monthly benefit totaled \$80 dollars. HISTORICAL BACKGROUND, *supra* note 18.

<sup>32</sup> *Id.* Other important modifications of Social Security during this era were the founding of Medicare and advent of Cost-Of-Living Adjustments. *Id.* On July 30, 1965, President Lyndon Johnson expanded the SSA by giving medical coverage to almost all Americans aged sixty-five and older. *Id.* The program was greatly received as almost twenty million enrolled within the first three years of its introduction. *Id.* In 1972, Cost-of-Living Adjustments provided automatic increases to account for inflation in Social Security benefits. HISTORICAL BACKGROUND, *supra* note 18. The primary purpose was to maintain the purchasing power of the benefits. *Id.*

of disabled workers who had been receiving such benefits.<sup>33</sup> However, shortly after in 1983, the SSA's workload became increasingly taxing, to the point where reviews were stopped.<sup>34</sup> The next year, Congress responded by passing the Disability Benefits

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* Continuing disability reviews (CDRs), though halted in 1983, are still in effect today. 2009 Annual Report of the SSI Program: Historical Redetermination and Continuing Disability Review Data, SOCIAL SECURITY ONLINE, [https://www.socialsecurity.gov/OACT/ssir/SSI09/Redet\\_CDRdata.html](https://www.socialsecurity.gov/OACT/ssir/SSI09/Redet_CDRdata.html) (last visited Dec. 20, 2010). CDRs and redeterminations are the two types of reviews conducted by the SSA in determining one's continued eligibility and compliance. *Id.* A redetermination is a non-medical assessment of an applicant's materials to conclude that the applicant is still eligible to receive benefits and that the amount of benefits received is accurate. *Id.* "Every year [the] SSA schedules for redetermination the cases most likely to have payment error, but even the cases unlikely to have payment error are scheduled at least once every 6 years." *Id.* To determine the likelihoods the SSA:

[U]ses the limited issue process to detect situations that have the potential to affect the continuing eligibility of SSI recipients and SSI payment amounts. SSA conducts periodic computer matches between its own system and the systems of other Federal and State agencies to determine if the income and resources information on SSI recipients' records is in conflict with data obtained from the other systems. Matches detecting conflicting information usually result in the posting of an indicator to the Supplemental Security Record of the SSI recipient. The limited issue case is then selected for a field office review of the issue for which the indicator was posted. *Id.*

CDRs returned on October 1, 1994, as the SSA had issued a Federal Register notice. 2009 ANNUAL REPORT, *supra* note 34. The Social Security Disability Amendments of 1980, section 221(i) mandate continuing disability review of all Title II disabled recipients at least once every three years. *Id.* Moreover, section 1614(a)(4) permits the discretion of the SSA to conduct periodic reviews as fit. *Id.* From 1996-1998, public law mandated that SSA conduct at least 100,000 CDRs. *Id.* To handle this massive workload, the SSA, like it does with redeterminations, follows a method: SSA developed, beginning in 1993, a process by which certain title II cases scheduled for a CDR would be screened using the results of a profiling process which included a mailer interview for some cases . . . On January 27, 2007 SSA implemented a streamlined failure to cooperate (FTC) process for medical CDRs in the field office (FO). Cases where the beneficiaries failed to comply with the FO's requests for necessary information during the CDRs have their eligibility for disability benefits terminated after 12 consecutive months of suspension for noncompliance. *Id.*



Reform Act, which curtailed the SSA's workload to the amount and type of program that is currently in effect today.<sup>35</sup>

### III. ELIGIBILITY, APPLICATION PROCESS & APPEALS

As a direct extension of being a government agency with limited funding and resources, the SSA must provide cutoffs in allocating benefits. A Social Security disability applicant must be able to demonstrate that they have: (1) the requisite number of work credits, and (2) their disability must be such as to be considered severe.<sup>36</sup> In order to meet the first criterion, applicants "must have worked long enough--and recently enough--under Social Security to qualify for disability benefits."<sup>37</sup> What is considered "long enough" and "recently enough" is established based off Social Security work credits.<sup>38</sup> These work credits are determined according to one's yearly income and are capped at a maximum of four possible work credits in a single year.<sup>39</sup> The threshold amount needed to earn a single work credit changes on a yearly basis.<sup>40</sup> For instance, in 2009, one work credit was awarded for \$1,090 of earned wages or self-

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<sup>35</sup> HISTORICAL BACKGROUND, *supra* note 18. From the Congressional record of the House of Representatives regarding the passage of Disability Benefits Reform Act of 1984, it is evident that Congress was surprised by the impact of the legislature in 1980 that required the SSA to provide periodic reviews of Social Security disability recipients. *Vote Tallies: 1984 Disability Amendments*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/history/tally1984.html> (last visited Dec. 20, 2010).

When Congress ordered a thorough review fo [*sic*] the disability rolls in 1980, it was anticipated that only those individuals who had fraudulently received benefits would be removed from the rolls. Congress most certainly did not anticipate that almost 500,000 people would be cut from the rolls in a period of 3 years. The fact that almost two-thirds of those who appealed were returned to the rolls after administrative review leadsme [*sic*] to surmise that the cutoffs were made far too hastily or with disregard to congressional intent. *Id.*

<sup>36</sup> *How Much Work Do You Need?*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/dibplan/dqualify2.htm> (last updated Jan. 4, 2010)(last visited Dec. 20, 2010).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

employed income.<sup>41</sup> In 2010, the threshold will rise thirty dollars to \$1,120.<sup>42</sup> Also, the number of work credits required in order to be eligible to receive disability benefits varies by the age of the person when they became disabled.<sup>43</sup> For example, if a person becomes disabled at the age of fifty, they will need twenty-eight work credits with at least twenty of those coming within the last ten years prior to the disability.<sup>44</sup>

The second criterion, "disability," is the one that is most frequently the topic of debate during disability appeal hearings.<sup>45</sup> In order to be eligible for disability benefits, an applicant must demonstrate an injury or ailment such that, "you cannot do work that you did before; we decide you cannot adjust to other work because of your medical condition(s); and your disability has lasted or is expected to last for at least one year or to result in death."<sup>46</sup> Social Security disability is not a program that affords benefits to applicants who have only a semi-disabling injury or only have short-term disability.<sup>47</sup> The SSA assumes and expects that such conditions can and will be handled through other various forms of financial assistance: workers' compensation, insurance, and the individual's own savings.<sup>48</sup> In helping potential applicants assess and evaluate their own disability, the SSA asks five questions: (1) Are you working?;<sup>49</sup> (2) Is your condition "severe?;"<sup>50</sup> (3) Is your condition

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<sup>41</sup> HOW MUCH WORK, *supra* note 36.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *What We Mean By Disability*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/dibplan/dqualify4.htm> (last visited Dec. 20, 2010).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *How We Decide If You Are Disabled*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/dibplan/dqualify5.htm> (last visited Dec. 20, 2010).

<sup>49</sup> *Id.* While current employment does not necessarily disqualify applicants automatically, it provides more of an obstacle for such working applicants. *Id.* For example, an applicant who worked in the year 2009 could not be considered "disabled" if they made an average of \$980 monthly. *Id.* This monthly average will be bumped to \$1000 in the year 2010. *Id.*

<sup>50</sup> HOW WE DECIDE IF YOU ARE DISABLED, *supra* note 48. The word "severe" is defined as relating to basic work-related activities as determined by one's occupation. *Id.* So one's ability to stand, sit, crouch, reach and carry a certain

found in the list of disabling conditions?;<sup>51</sup> (4) Can you do the work you did previously,<sup>52</sup> and (5) Can you do any other type of work?<sup>53</sup>

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amount of weight are factors that are considered during the medical portion of the application review. *Id.*

<sup>51</sup> *Id.* Consider this the shortcut in applying for and receiving Social Security disability benefits. *Id.* Currently, the Social Security Administration has two processes that expedite the processing of disability claims: Compassionate Allowances and Quick Disability Determinations. HOW WE DECIDE IF YOU ARE DISABLED, *supra* note 48. Compassionate Allowances is a list composed of over fifty disabling diseases. *Id.* If an applicant is diagnosed with a Compassionate Allowances disease, then their physical condition automatically qualifies as “disabling,” entitling the applicant to Social Security disability benefits. *Id.* Quick Disability Determinations addresses the wait time that applicants go through when their application is pending. *Id.* Using computer technology, the administration is able to fast track decisions on claims where the probability of a qualifying disability is high. *Id.*

<sup>52</sup> HOW WE DECIDE IF YOU ARE DISABLED, *supra* note 48. Evidence that an applicant is able to work in their previous area of employment demonstrates the lack of “severity” of the physical condition. *Id.* The examination of this question is determined through investigating of a few factors: demands of “relevant” past work, assessment of the applicant’s ability to do work related functions, and comparison of the work as observed in the national economy. *How Do You Decide Whether I Can Do My Past Work?*, SOCIAL SECURITY ADMINISTRATION, [http://www.ssa.gov/disability/step4and5.htm#Q4\\_2](http://www.ssa.gov/disability/step4and5.htm#Q4_2) (last visited Dec. 20, 2010). The “relevant” work is considered to be work that “you did in the 15 years before we decide your case, and involved significant and productive physical or mental activities done (or intended) for pay or profit, and you did long enough to learn how to do it.” *Id.* The interesting point here is that while an applicant will provide in their application a complete description of their past “relevant” work, the final determination of what their “job description” consists of can come from an examination of the job from a nationwide perspective. *Id.* So while the applicant’s actual condition may prohibit one from performing specific duties related to their job, coverage can still be denied if the job, considered in the aggregate nationwide, does not lead to a similar job description. *Id.*

<sup>53</sup> HOW WE DECIDE IF YOU ARE DISABLED, *supra* note 48. If an applicant is unable to perform their previous work as it was done or as it is done in the economy generally, then an inquiry into other manageable work is next. *Id.* Based off one’s medical conditions, age, education, past work experience, and transferable skills, ascertainable work is identified if possible. *Id.* Increasing age is discerned by the SSA to limit one’s ability to adapt to other types of work. *How Do You Consider Age?*, SOCIAL SECURITY ADMINISTRATION, [http://www.ssa.gov/disability/step4and5.htm#Q5\\_1](http://www.ssa.gov/disability/step4and5.htm#Q5_1) (last visited Dec. 20, 2010). In general and on an increasing scale, ages up to fifty are viewed to present no substantial hardship for an applicant’s ability to adapt to other types of work. *Id.* Ages fifty to fifty-four are viewed, along with a severe impairment and limited

If an applicant is determined to meet each of these five thresholds, then a finding of “disabled” is appropriate. If an applicant fails to meet the initial five question test, an applicant still might be able to qualify if their situation is covered by a special circumstance exception.<sup>54</sup>

But even before a decision is rendered, an applicant must abide by a lengthy application process in order to even be considered for disability benefits. And while the majority of this process can be viewed as mundane and procedural, it nevertheless is essential and, sometimes, life-altering in getting timely financial assistance to needy applicants. Abiding by application requirements can be just as important as the disability review itself and a similar scrutinizing mindset is an appropriate inquiry.

Due to the lengthy application process, applicants are strongly encouraged to apply as soon as they become disabled.<sup>55</sup> The

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work background, as considerable obstacles to adapting to a new line of work. *Id.* Advanced age (determined to be fifty and older) is, by itself, a significant factor in finding against an applicant's ability to adjust to other work. *Id.* Education is not self-evident or determinative from the basis of school or vocational training. *How Do You Consider Education?*, SOCIAL SECURITY ADMINISTRATION, [http://www.ssa.gov/disability/step4and5.htm#Q5\\_1](http://www.ssa.gov/disability/step4and5.htm#Q5_1) (last visited Dec. 20, 2010). An illiteracy and inability to communicate in English will be seen as an educational factor that severely hampers an applicant's ability to adapt to other work. *Id.* In light of age, education, and past work experience, the SSA has developed a set of tables that are intended to serve as a guide in the course of discussing an applicant's remaining ability to perform any other type of work and the extent of such work. *How Do You Evaluate the Effect of My Age, Education and Work Experience on My Remaining Capacity to Work?*, SOCIAL SECURITY ADMINISTRATION, [http://www.ssa.gov/disability/step4and5.htm#Q5\\_1](http://www.ssa.gov/disability/step4and5.htm#Q5_1) (last visited Dec. 20, 2010). For example, a fifty-seven year old with high school education and no transferrable skills will be limited to lifting no more than twenty pounds for up to one-third of an eight hour shift, no more than ten pounds for two-thirds of an eight hour shift, and has ability to walk/stand for about six hours of an eight hour work shift. *Id.* If the review leads to a conclusion that positions in “significant numbers” exist in the national economy that are within an individual's work capacity, the applicant will not be considered “disabled.” *Id.*

<sup>54</sup> *Special Situations*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/dibplan/dqualify7.htm> (last visited Dec. 20, 2010). Currently, there are four special situations; (1) Special rules for people who are blind or have low vision; (2) Benefits for widows or widowers who are disabled; (3) Benefits for children who are disabled; (4) Disability benefits for Wounded Warriors. *Id.*

<sup>55</sup> *How to Apply*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/dibplan/dapply.htm> (last visited Dec. 20, 2010).

administration provides three ways to begin and complete the filing of an application: online, over a toll-free telephone number, or at your local Social Security office.<sup>56</sup> After compiling the requisite information,<sup>57</sup> an applicant will need to file an Application for Benefits along with an Adult Disability Report Form.<sup>58</sup> An initial decision on the application will be made within three to five months.<sup>59</sup> The notification will arrive in a letter via mail and will explain the reasoning behind the decision.<sup>60</sup> This decision is not final, as applicants have the opportunity to appeal.<sup>61</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> *Information We Will Need*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/dibplan/dapply2.htm> (last visited Dec. 20, 2010). The SSA claims applicants will wait an average of three to five months for an initial determination. *Id.* To prevent an extended waiting period, applicants must make available the requisite information which includes:

Your social security number and proof of age; Names, addresses, and phone numbers of doctors, caseworkers, hospitals, clinics that took care of you and the dates of your visits; Names and dosages of all medications you are taking; Medical records from your doctors, therapists, hospitals, clinics, and caseworkers, that you already have in your possession; Laboratory and test results; A summary of where you worked and the kind of work you did; Your most recent W-2 form, or if you are self-employed, a copy of your federal tax return.

*Id.*

<sup>58</sup> *Id.* The application for Benefits need only filled out by applicants who have worked and thus have paid into the system. *Apply for Disability Benefits – Adult (Age 18 or Over)*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/applyfordisability/adult.htm> (last visited Dec. 20, 2010). The Adult Disability Report Form will provide the relevant details regarding any physical conditions and also grants a treating physician permission to release any pertinent information as necessary. *Id.*

<sup>59</sup> HOW TO APPLY, *supra* note 55.

<sup>60</sup> *The Appeals Process*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/pubs/10041.html> (last visited Dec. 20, 2010).

<sup>61</sup> *Id.* The appeals generally revolve around one of two issues: discussion over the definition of “disabled” or the amount of benefits received. *Id.*

### A. Appeals Process

The appeals process, similar to the original application period, can be a lengthy ordeal.<sup>62</sup> The cause of such an extended appeals wait is two-fold: (1) the current backlog of disability cases, both initial and appeals, and (2) the extensive review undergone during appeals.<sup>63</sup> As part of the review, the decision will be examined in its entirety.<sup>64</sup> Even the matters that were found to be in favor of the applicant initially are able to be overturned in review.<sup>65</sup> Assuming that a denied applicant appeals in a timely manner, there are four possible levels of review: (1) reconsideration, (2) hearing by an Administrative Law Judge, (3) review by the Appeals Council, and (4) Federal Court review.<sup>66</sup> Reconsideration brings in a new pair of eyes as a complete review is done by a party that did not play any role in the initial decision.<sup>67</sup> The applicant, though able to do so, need not be present nor submit any additional evidence to garner reconsideration.<sup>68</sup> A hearing by an administrative law judge is the next step in the appeals process.<sup>69</sup> The administrative law judge will

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<sup>62</sup> *Id.*; FREQUENTLY ASKED QUESTIONS, *supra* note 6.

<sup>63</sup> THE APPEALS PROCESS, *supra* note 60.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Applicants wishing to appeal must make their appeal timely in order for it to be valid. *Id.* A timely appeal is one made in writing prior to sixty days from the date of receipt of the notification letter. *Id.* However, there is a default rule that the Administrative Board will assume receipt of the notification letter five days after the date of the letter. THE APPEALS PROCESS, *supra* note 60. This is a presumption that is able to be rebutted with evidence suggesting otherwise. *Id.* Also, if an applicant's application for disability benefits was denied for medical reasons, the appeal may be filed online on the Social Security website. *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> THE APPEALS PROCESS, *supra* note 60. The administrative law judge hearing is very similar to that of most court proceedings. *Id.* The applicant will have an opportunity to bring his or her case through evidence and questioning of witnesses. *Id.* The witnesses generally consist of medical experts that have either treated the applicant or at least reviewed medical records of such treatment. *Id.* Though strongly encouraged to attend the hearing, applicants may notify in writing that they will not attend the hearing unless the presiding administrative law judge insists on their attendance. *Id.* If an applicant is unable to be physically present,

serve as an impartial decision maker who had no role in the original or reconsideration decision.<sup>70</sup> The respective judge will notify the appellant of the date and time of the hearing, which generally is ordered to be within seventy-five miles of the appellant's place of residence.<sup>71</sup> Unlike reconsideration, the hearing gives the appellant an opportunity to be heard.<sup>72</sup> However, in doing so, the applicants are strongly urged to provide additional evidence and to focus their arguments on the denial or reduction of benefits in order to not waste the court's time.<sup>73</sup> The hearing proceeds as a back-and-forth interaction between the judge and appellant and any witnesses that are brought forth.<sup>74</sup> After hearing the matter, the judge will issue a ruling.<sup>75</sup> Once again, this ruling can be challenged, but at this point in the process, there are no guarantees of being granted a higher appeal.<sup>76</sup> Similar to the manner in which parties ask the United States Supreme Court for review is the procedure that an applicant

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technology exists to allow for video conferencing. THE APPEALS PROCESS, *supra* note 60.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> THE APPEALS PROCESS, *supra* note 60.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* While these options are technically available, it is important to consider a couple of matters that affect the likelihood of an applicant in choosing to do so. First, if an applicant does choose to go along the four level appeal process, it may be necessary to update medical records as to show the SSA review board that this indeed is still a long-term disability or to provide further evidence to demonstrate the condition possibly has even worsened. *Id.* As a result and unless it is a court appointed medical examination, a portion of these medical costs will be put on the applicant, who most likely is already burdened by financial hardship as evident by their decision to file an application in the first place. This also fails to account for any legal representation and subsequent fees. However, it is worth noting that no representation may seek compensation before submitting a written request to Social Security. *Your Right to Representation*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/pubs/10075.html#part6> (last visited Dec. 20, 2010). Also, time is a consideration as well. After an injury and the initial three to five month wait for an initial decision, an applicant's reconsideration and first administrative law judge hearing could take over 12 months, if not longer. *Frequently Asked Questions #10*, SOCIAL SECURITY ADMINISTRATION, *supra* note 6. Such a prolonged lapse of time really should stress the importance of making sure, up front, the accuracy and completeness of any ruling or decision.

will go through with the Social Security's Appeal Council.<sup>77</sup> An applicant seeking to appeal an administrative law judge's decision will ask the Appeal Council to take the case.<sup>78</sup> The Appeal Council has the discretion to either hear the case, refuse to hear the case, or even send the case back to another administrative law judge for an additional hearing and review.<sup>79</sup> The last resort for an applicant is to file a lawsuit in the federal court system.<sup>80</sup>

### B. Disability Benefits & Continuing Disability Reviews

If an applicant is successful at either part of the application or appeal process, he or she is entitled to disability benefits and any spouses or dependents could also qualify for coverage where applicable.<sup>81</sup> These benefits will be computed based on earnings and

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<sup>77</sup> THE APPEALS PROCESS, *supra* note 60.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* If an applicant is appealing a decision that has either reduced their benefits intake or prohibited their eligibility for continuing benefits, then there exists an issue of what happens to the current benefits during an appeal. *Id.* The issue is partly unclear. THE APPEALS PROCESS, *supra* note 60. While the Social Security website provides that such disability benefits will continue during the appeal process, such a request must be communicated within ten days of the original notification letter. *Id.* However, should the applicant be unsuccessful in the appeals attempt, then Social Security may or may not force that applicant to pay back the amount of benefits he or she was not entitled. *Id.* It is evident that such circumstances create an incentive for applicants to file frivolous appeals and to extend them as long as possible. With an already growing backlog of cases waiting for an initial decision, reconsideration or administrative law judge hearings, it is an issue that should be considered when examining the inefficiencies of the system.

<sup>81</sup> *Id.* Certain members of the family may be eligible to receive disability benefits under certain conditions. *Can My Family Get Benefits?*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/pubs/10029.html#part2> (last visited Dec. 20, 2010). There are five possible scenarios that may extend benefits to family members: (1) Your spouse is sixty-two years or older; (2) Your spouse, of any age, if he or she is caring for a child of yours that is sixteen years or younger or disabled; (3) Your unmarried child (including adopted; or in some cases a stepchild or grandchild) must be age eighteen or younger (or age nineteen or younger if child is enrolled full-time in elementary or secondary school); (4) Your unmarried child (age eighteen or older) if he or she currently has a disability that began before age twenty-two (the same definition of "disability" that applies



will be delayed and subject to re-evaluation.<sup>82</sup> Benefits begin and are paid in full in the sixth months following the date of disability, which is determined by the administration.<sup>83</sup> For example, an applicant who wins his or her case and whose date of disability is designated as January 15 will receive his or her first benefit payment in July of that year.<sup>84</sup> Generally, these benefits will continue as long as an applicant remains eligible.<sup>85</sup> In other words, these benefits will continue so long as an applicant's condition has not improved and he or she has not been able to work.<sup>86</sup> Alongside the first benefit payment, each applicant receives a "What You Need to Know When You Get Disability Benefits."<sup>87</sup> This packet provides the recipient with relevant information regarding his or her benefits.<sup>88</sup> In

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to applicants also applies to the unmarried child); (5) A divorced spouse could qualify based off earnings if married at least ten years, not currently married, and is age sixty-two or older. *Id.*

<sup>82</sup> *What Happens When My Claim is Approved?*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/pubs/10029.html#part2> (last visited Dec. 20, 2010). The monthly disability benefits will be computed based off an applicant's average lifetime earnings. *Id.* Every year, a Social Security statement is sent to individuals working in positions covered by Social Security. *Id.* This statement will provide each recipient with their lifetime earnings as well as an estimate of their disability benefits should they qualify in the future. *Id.* The statement also gives an expected value of retirement benefits as well as survivor benefits that might be available later in their lifetime. *Id.*

<sup>83</sup> WHAT HAPPENS WHEN MY CLAIM IS APPROVED, *supra* note 82.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *What You Need to Know When You Get Social Security Disability Benefits*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/pubs/10153.html> (last visited Dec. 20, 2010). This publication provides the rights and responsibilities of those receiving disability benefits. *Id.* It explains how and when benefits will be dispersed (direct deposits or checks by mail), how taxes on benefits are calculated and applied, and cost of living adjustments. *Id.* Cost of living adjustments are given every year beginning in January based off inflation. *Id.* The pamphlet also provides information regarding other programs that recipients might also qualify: Supplemental Security Income, Food Stamps, and Medicare. *Id.* Individuals receiving disability benefits for twenty-four months will automatically qualify for Medicare coverage. WHAT YOU NEED TO KNOW WHEN YOU GET SOCIAL SECURITY DISABILITY BENEFITS, *supra* note 87.

<sup>88</sup> *Id.*

particular, it informs them of their duties.<sup>89</sup> Each recipient is instructed and required to contact Social Security to report improvements in medical condition, changes their ability to work, when, if ever, they have returned to work.<sup>90</sup> Most importantly, they are given notice of the periodic re-examinations of medical conditions.<sup>91</sup> The frequency of these continuing disability reviews is based on the severity of the disabling condition and the likelihood that the condition will improve over time.<sup>92</sup> The likelihood is evaluated and broken down into three categories: (1) medical improvement expected, (2) improvement possible, or (3) improvement not expected.<sup>93</sup> Medical improvement expected typically consists of a first review within six to eighteen months after receiving the initial disability payment.<sup>94</sup> An applicant whose condition is not as likely to improve but is still nevertheless “possible” will generally have his or her first review and subsequent reviews every three years.<sup>95</sup> For those physical ailments that anticipated as permanent or less likely to improve will be reviewed just once every five to seven years.<sup>96</sup>

The continuing disability review operates in a similar manner as the original application review.<sup>97</sup> A letter and phone call will notify

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<sup>89</sup> *Id.* The duty to report material changes affecting eligibility for disability benefits extend not just to the applicant but to those family members who are receiving benefits based of your work history and disability. *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> WHAT YOU NEED TO KNOW WHEN YOU GET SOCIAL SECURITY DISABILITY BENEFITS, *supra* note 87.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> WHAT YOU NEED TO KNOW WHEN YOU GET SOCIAL SECURITY DISABILITY BENEFITS, *supra* note 87.

<sup>97</sup> *Id.* The only real difference being that an initial check for eligibility is not done as would be completed in the initial decisions of the original applications. *What You Need to Know: Reviewing Your Disability*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/pubs/10068.html> (last visited Dec. 20, 2010). Aside from that, the process is the same. *Id.* The review is sent to Disability Determination Services in the state that the applicant resides. *Id.* Based off the acquired information (acquired from the doctors who treated the applicant and other medical sources) a decision is rendered. *Id.*

the applicant of the pending review and of his or her rights during the process.<sup>98</sup> The examination board, consisting of a medical doctor and disability examiner, will review the applicant's original file and updated supplementary information regarding his or her medical condition.<sup>99</sup> If necessary, the board may request a medical examination.<sup>100</sup> A decision is rendered and the parties are notified via the mail.<sup>101</sup> Once again, the decision is not final and the appeal process can be initiated.<sup>102</sup> If a party chooses not to appeal, then disability benefits will stop three months from the date that the board determined "the disability ended."<sup>103</sup>

### C. Correcting Incentives to Report Changes in Condition

As mentioned above, family members and the actual applicant have a responsibility to report any improvements in his or her medical condition or any matters that increase the individual's ability to work.<sup>104</sup> These circumstances pose a similar problem evident in any social welfare program.<sup>105</sup> If one of the primary objectives of such a program is to ultimately put the recipient in a position so as to be self-sustaining, then a problematic question arises: What motivation and effort to find a job does one expect from an

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<sup>98</sup> WHAT YOU NEED TO KNOW WHEN YOU GET SOCIAL SECURITY DISABILITY BENEFITS, *supra* note 87.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* If a request for special medical examination is needed, then the administration will cover the costs associated with the exam and cover a portion of the transportation expenses. *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> WHAT YOU NEED TO KNOW WHEN YOU GET SOCIAL SECURITY DISABILITY BENEFITS, *supra* note 87. The appeal process is identical to the appeals that occur following an initial decision on an original application. *Id.* There is a potential for a four step appeal process: reconsideration, administrative judge hearing, appeals council, and then filing a lawsuit in federal court. *Id.* In order for it to be a timely appeal it must be filed within sixty days from the time you receive notification of the decision. *Id.* There also is a sixty day appeal time period in appealing from one step of appeals to another. *Id.*

<sup>103</sup> WHAT YOU NEED TO KNOW WHEN YOU GET SOCIAL SECURITY DISABILITY BENEFITS, *supra* note 87.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

individual who, at the moment, has been receiving and surviving on government issued financial assistance? Or, in this case specifically, what incentive does a disabled, out-of-work individual have to report accurately his current medical condition when he is already receiving disability insurance for the remainder of his lifetime? The SSA has in place protective measures to guard against the natural incentives arising from the disability insurance program.

First, the amount of disability benefits itself serves to curb this problem. By scaling back the amount received, a recipient will enjoy a lower standard of living, as compared to what he or she would typically enjoy when actually working. Second, under the law, giving intentional false statements during the course of a medical review or appeal will cut off benefits.<sup>106</sup> A first violation will stop benefit payments for six months.<sup>107</sup> A second violation will terminate benefits for twelve months.<sup>108</sup> A third violation stops benefits for twenty-four months.<sup>109</sup> Even a failure to report an improvement in a medical condition may lead to overpayment which, if it occurs, must be repaid.<sup>110</sup>

But these two protective measures cannot be viewed as a complete solution, nor have they been.<sup>111</sup> While penalties for

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> WHAT YOU NEED TO KNOW WHEN YOU GET SOCIAL SECURITY DISABILITY BENEFITS, *supra* note 87.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* The penalties of temporary termination of benefits or repayment due to a failure to report (if it leads to an overpayment) are arguably not strong enough to be effective deterrents. First, it is a difficult threshold to meet in order to prove "intentional false statements," as opposed to simple negligence or carelessness. One is required to show the actual intent of recipient's mental state where "simple carelessness" could serve as a reasonable alternative explanation. Second, if a recipient is intentionally looking to get his benefits extended or raised, it is in his or her best interest to omit and fail to report relevant information as opposed to giving misleading statements due to the expected penalties. The worst possible scenario is that a recipient must pay back benefits they have already enjoyed. Unless there are medical records indicating an exact date demonstrating an improved medical condition, chances are that the period of overpayment will be difficult to determine, decreasing the likelihood that the recipient will have to "serve out" their worst possible scenario.

<sup>111</sup> *Your Ticket to Work*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/pubs/10061.html> (last visited Dec. 20, 2010).

misstatements and lower benefits are the “sticks,” the SSA implemented the *Ticket to Work* program as the “carrot” to provide an encompassing solution.<sup>112</sup> The *Ticket to Work* program provides expanded assistance to Social Security beneficiaries in finding, obtaining, and retaining employment.<sup>113</sup> In doing so, the *Ticket to Work* program meets its objective by “increas[ing] the likelihood that these individuals will reduce their dependency on Social Security and

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<sup>112</sup> *Id.* “Carrot and Stick” is an old idiom that dates back to the 19th century that suggests a behavior modification through a combination of bribery and threat. Jan Freeman, *Carrot Unstuck*, BOSTON GLOBE, Mar. 8, 2009, available at [http://www.boston.com/bostonglobe/ideas/articles/2009/03/08/carrot\\_unstuck/](http://www.boston.com/bostonglobe/ideas/articles/2009/03/08/carrot_unstuck/). It was first used in an 1876 book about John Stuart Mill, as his father subjected him to “carrot and stick” discipline. *Id.*

<sup>113</sup> YOUR TICKET TO WORK, *supra* note 111. By participating in the *Ticket to Work* program, individuals can get assistance finding a new job, vocational rehabilitation, or other assistance. *Id.* The services are provided by private organizations and government agencies that, in connection with Social Security, provide “employment networks.” *Id.* These employment networks will help individuals develop a plan that is suitable based off their stated goals, type of work, and income expected. *Id.* Moreover, on top of the *Ticket to Work* program, Social Security has defined other rules to create “work incentives” to help bridge the gap between disabled and employed. *Id.* Such “work incentives” include: cash benefits while working, Medicare or Medicaid while working, and financial assistance with other work expenses due to your disability. YOUR TICKET TO WORK, *supra* note 111. Also, Social Security has a developed transitional period in order to ease disabled individuals back into employment. *Working While Disabled—How We Can Help*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/pubs/10095.html> (last visited Dec. 20, 2010). The transitional period is divided into three categories: (1) Trial Period, (2) Extended Period of Eligibility, and (3) Expedited Reinstatement. *Id.* During the trial period, which is generally composed of the initial nine months back at work, a disabled worker is able to test their work ability while still maintaining full Social Security benefits regardless of their income earnings, as long as work is reported and disabling condition remains. *Id.* Extended period of eligibility is a thirty-six month time period giving the disabled worker the opportunity of continuing benefits, given that their income is not considered “substantial.” *Id.* “Substantial” is a time sensitive calculation. *Id.* In 2009, “substantial” was defined to mean \$1000 monthly earnings or more (\$1,640 if blind). WORKING WHILE DISABLED, *supra* note 113. The last period, expedited reinstatement, provides the last safeguard before benefits are entirely removed. *Id.* Once a disabled worker’s income becomes substantial, they have five years to ask Social Security for immediate reinstatement for benefits due for a disability that prevents them from working. *Id.*

SSI cash benefits.”<sup>114</sup> The program is free of charge and entirely optional to current recipients of either Social Security Disability or Supplemental Security Income.<sup>115</sup> While the program is voluntary, it does have significant impact on continuing disability reviews.<sup>116</sup> As long as the recipients are participating in the program, then the periodic medical condition reviews are stayed.<sup>117</sup> This is crucial as it allows participants to better their employment prospects without having it count against the current benefits that they are enjoying.<sup>118</sup> Social Security has recognized that work ability does not always translate to actual work performance and has employed the *Ticket to Work* program as means to bridge this gap and provide the extra incentive for individuals with the desire to work in some capacity again.<sup>119</sup>

#### IV. COMPASSIONATE ALLOWANCES

As exemplified above, Social Security Disability is a complex and time consuming process.<sup>120</sup> There is an average of a three to five month wait for a decision on the original application.<sup>121</sup> If one is lucky enough to win his or her case at this stage, benefits are not immediate, but rather they are paid six months after the determined date of disability.<sup>122</sup> Should an applicant be rejected and an appeal process ensue, reconsideration amounts to a similar wait.<sup>123</sup> Administrative law judge hearings, due to case backlog and limited judges, can amount to a wait of up to two years.<sup>124</sup> Therefore, it could be upwards of thirty months before an applicant is even able to

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<sup>114</sup> *Id.* *What is the Purpose of the Ticket to Work Program?*, SOCIAL SECURITY ADMINISTRATION, [http://www.socialsecurity.gov/OP\\_Home/cfr20/411/411-0105.htm](http://www.socialsecurity.gov/OP_Home/cfr20/411/411-0105.htm) (last visited Dec. 20, 2010).

<sup>115</sup> YOUR TICKET TO WORK, *supra* note 111.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *See supra* text accompanying notes 62-80.

<sup>121</sup> INFORMATION WE WILL NEED, *supra* note 57.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

personally appear and present his or her case to a member of the judiciary.<sup>125</sup> Even suspected criminals have their day in court within a number of hours after being taken into custody.<sup>126</sup> The Appeals

Council is not a guarantee and filing a lawsuit in federal court is not a timely or financially efficient route.<sup>127</sup> The timing can be a source of frustration for any applicant, especially considering what is at stake.<sup>128</sup>

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<sup>125</sup> *Id.*

<sup>126</sup> In California, criminal defendants, as guaranteed under the Fifth Amendment of the United States Constitution and Article I, Section 15 of the California Constitution, have a right to a speedy trial. U.S. CONST. amend. IV; CAL. CONST. art. 1, § 15. A right to a speedy trial, in California, has included an arraignment within forty-eight hours of the arrest, and, if not, then on the next court day. *Arraignment Within 48 Hours of Arrest*, THE CALIFORNIA CENTER FOR JUDICIAL EDUCATION AND RESEARCH, <http://www2.courtinfo.ca.gov/protem/courses/arraign/01-04.htm> (last visited Dec. 20, 2010). This is not to suggest that Social Security disability benefits should have an analogous priority as the right to speedy trial, which is deeply rooted within the confines of our nation's political history, but does, at the least bit, invoke an overwhelming sense of curiosity. Why should a right to a speedy trial be that much different than a privilege to a speedy disability decision when, in some cases, the consequences for both can and have been possible death? Of course, the difference is obvious. One is a recognized, unalienable, and fundamental right, while the other has been America's afterthought. An innocent man being sent to prison represents a grave flaw in the justice system necessitating immediate justification, while a death caused by the commonly accepted inefficient government program is just the way it is. Eric De La Cruz's sister, Veronica De La Cruz, vigorously fought to save her brother's life. PARKER-POPE, *supra* note 1. After failing to secure disability benefits, the former CNN anchor attempted to raise public awareness and enough money to pay for the one million dollar surgery by donated funds. *Id.* Even Trent Reznor, from the band Nine Inch Nails, awarded backstage passes to donors and Tony Hawk auctioned off autographed skateboards. *Id.* Even with the money however, UCLA's Medical Center's heart transplant program insisted upon a secondary insurance policy – all while Eric's conditioned worsened to the point where a heart transplant was no longer feasible. *Id.* She even appealed, with no success, to state legislators to pressure a federal panel to expedite the disability hearing review set for spring of 2010. *Id.* Eric's story is a sad realization that represents the great chasm still existing today between deathly sick disability applicants and the awareness and concern of the American public.

<sup>127</sup> INFORMATION WE WILL NEED, *supra* note 57.

<sup>128</sup> *Id.*

Eric De La Cruz passed away on July 4, 2009, after an almost ten-year battle with a severe case of dilated cardiomyopathy.<sup>129</sup> Being burdened with such a medical condition at an early age and not being able to live out one's life expectancy is a grievous situation for any of Eric's family members to cope with.<sup>130</sup> But the truer, more painful, and gut-wrenching realization is that it did not have to happen the way it did.<sup>131</sup>

Compassionate Allowances<sup>132</sup> provide shortcuts through the tiresome maze of filing, waiting, and appealing disability

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<sup>129</sup> PARKER-POPE, *supra* note 1.

<sup>130</sup> Depending on one's sources, the average life expectancy for a United States citizen centers around 77.7 years. *Life Expectancy*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/nchs/fastats/lifexpec.htm> (last visited Dec. 20, 2010). To be more exact, other determining factors that can be helpful in the analysis include: current age, race, sex, gender, medical history, and family tree history. *Id.*

<sup>131</sup> Tara Parker-Pope from the New York Times writes, "Ms. De La Cruz says a surgeon told her he could have helped her brother, but that he arrived 'two years too late.' If not for all the delays and denials, she says, her brother would be alive today." PARKER-POPE, *supra* note 1. Moreover, Ms. De La Cruz expresses her frustrations with the current disability system, "How can a sick person navigate the system? I am healthy and can barely do it on my own. The system is designed for people to get frustrated and give up." *Id.*

<sup>132</sup> The initial list of Compassionate Allowances (twenty-five cancers and twenty-five diseases) is composed of the following: (1) Acute Leukemia; (2) Adrenal Cancer - with distant metastases or inoperable, unresectable or recurrent; (3) Alexander Disease (ALX) - Neonatal and Infantile; (4) Amyotrophic Lateral Sclerosis (ALS); (5) Anaplastic Adrenal Cancer - with distant metastases or inoperable, unresectable or recurrent; (6) Astrocytoma - Grade III and IV; (7) Bladder Cancer - with distant metastases or inoperable or unresectable; (8) Bone Cancer - with distant metastases or inoperable or unresectable; (9) Breast Cancer - with distant metastases or inoperable or unresectable; (10) Canavan Disease (CD); (11) Cerebro Oculo Facio Skeletal (COFS) Syndrome; (12) Chronic Myelogenous Leukemia (CML) - Blast Phase; (13) Creutzfeldt-Jakob Disease (CJD) - Adult; (14) Ependymoblastoma (Child Brain Tumor); (15) Esophageal Cancer; (16) Farber's Disease (FD) - Infantile; (17) Friedreich's Ataxia (FRDA); (18) Frontotemporal Dementia (FTD), Picks Disease -Type A - Adult; (19) Gallbladder Cancer; (20) Gaucher Disease (GD) - Type 2; (21) Glioblastoma Multiforme (Brain Tumor); (22) Head and Neck Cancers - with distant metastasis or inoperable or unresectable; (23) Infantile Neuroaxonal Dystrophy (INAD); (24) Inflammatory Breast Cancer (IBC); (25) Kidney Cancer - inoperable or unresectable; (26) Krabbe Disease (KD) - Infantile; (27) Large Intestine Cancer - with distant metastasis or inoperable, unresectable or recurrent; (28) Lesch-Nyhan Syndrome



applications.<sup>133</sup> The demonstrable rationale for the implementation of compassionate allowances is the recognition that a single, long line of non-discriminated applicants is inefficient.<sup>134</sup> It is undeniable that every applicant carries with them a unique medical condition that attaches with it a differing sense of urgency.<sup>135</sup> It would seemingly be intuitive to allow individuals suffering from fatal diseases to have their cases expedited.<sup>136</sup> After all, these disability benefits and subsequent Medicare coverage could be, as evident in the case of Eric De La Cruz, life saving.

The administration has followed such logic in initiating compassionate allowances.<sup>137</sup> On October 27, 2008, Commissioner Astrue announced the launch of the program.<sup>138</sup> In a news release,

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(LNS); (29) Liver Cancer; (30) Mantle Cell Lymphoma (MCL); (31) Metachromatic Leukodystrophy (MLD) - Late Infantile; (32) Niemann-Pick Disease (NPD) - Type A; (33) Non-Small Cell Lung Cancer - with metastases to or beyond the hilar nodes or inoperable, unresectable or recurrent; (34) Ornithine Transcarbamylase (OTC) Deficiency; (35) Osteogenesis Imperfecta (OI) - Type II; (36) Ovarian Cancer - with distant metastases or inoperable or unresectable; (37) Pancreatic Cancer; (38) Peritoneal Mesothelioma; (39) Pleural Mesothelioma; (40) Pompe Disease – Infantile; (41) Rett (RTT) Syndrome; (42) Salivary Tumors; (43) Sandhoff Disease; (44) Small Cell Cancer (of the Large Intestine, Ovary, Prostate, or Uterus);

(45) Small Cell Lung Cancer; (46) Small Intestine Cancer - with distant metastases or inoperable, unresectable or recurrent; (47) Spinal Muscular Atrophy (SMA) - Types 0 And 1; (48) Stomach Cancer - with distant metastases or inoperable, unresectable or recurrent; (49) Thyroid Cancer; (50) Ureter Cancer - with distant metastases or inoperable, unresectable or recurrent. *Initial List of Conditions*, SOCIAL SECURITY ONLINE, <http://www.socialsecurity.gov/compassionateallowances/conditions.htm> (last visited Dec. 20, 2010).

<sup>133</sup> See generally *Social Security Announces Nationwide Launch of Compassionate Allowances: Process Will Fast Track Applications for People with Cancers and Rare Diseases*, SOCIAL SECURITY ONLINE, <http://www.socialsecurity.gov/pressoffice/pr/compassionate-allowances-1008-pr.htm> (last visited Dec. 20, 2010).

<sup>134</sup> *Id.* This type of reasoning is common to many government bureaucracies and even a part of everyday activities, such as a carpool lane.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> SOCIAL SECURITY ANNOUNCES NATIONWIDE LAUNCH OF COMPASSIONATE ALLOWANCES, *supra* note 133.

Astrue backed the program, explaining its rationale, "getting benefits quickly to people with the most severe medical conditions is both the right and the compassionate thing to do."<sup>139</sup> Astrue argued that timing is the crucial factor in establishing an effective overhaul, "this initiative will allow us to make decisions on these cases in a matter of days, rather than months or years."<sup>140</sup> In implementing a quicker procedure, the administration has compiled a list of medical conditions that are so severe and likely permanent that the need to conduct a thorough medical examination and application review is unnecessary and excessive.<sup>141</sup> Hence, such applicants can move quickly through the application process and receive important benefits in a timelier manner.<sup>142</sup> In developing the initial list, the SSA went through a variety of measures in order to consider a wide range of medical conditions and evaluate which ones should be included.<sup>143</sup> The administration held numerous public hearings and worked cohesively with many National Institutes of Health throughout the country.<sup>144</sup> In obtaining information from medical experts in many fields, the administration ensured the reliability and updated statuses of the fifty medical conditions.<sup>145</sup> The administration believes that Compassionate Allowances, alongside the Quick Disability Determination process, will provide six to nine percent of applicants, on average, a six to eight day wait for an initial decision.<sup>146</sup> Six to nine percent of applicants totals roughly 250,000 people.<sup>147</sup>

#### A. *Getting the Support of the Senate Finance Committee*

Prior to the launch of the program, Commissioner Astrue gave a more extensive look into the compassionate allowances initiative in

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> SOCIAL SECURITY ANNOUNCES NATIONWIDE LAUNCH OF COMPASSIONATE ALLOWANCES, *supra* note 133.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

an attempt to gain approval and garner support in Washington D.C.<sup>148</sup> On May 23, 2007, in a statement before the Senate Finance Committee, Astrue testified to the present sense of urgency needed for administrative reform, “unfortunately, many of today’s applicants face an uphill battle simply to get a hearing before an Administrative Law Judge (ALJ). For some, the long wait for their day in court leads to homelessness and the loss of family and friends. Sadly, people have died waiting for a hearing.”<sup>149</sup> Astrue further noted the present difficulties in addressing this issue: growing disability program presently and in the future, increased administrative responsibilities, and insufficient funding.<sup>150</sup> The number of applicants has risen consistently in the past five years and, with the baby boomer generation reaching the age range most prone to disability, it can be expected to increase in the future.<sup>151</sup> Coping with the increase will continue, as Astrue argued, to stretch the SSA’s finances dangerously thin.<sup>152</sup> Since 2001, the administration has received 150 million dollars less annually than what the President has requested.<sup>153</sup> Continuing this trend, Astrue argued, will significantly hamper the planned progress the administration has in store.<sup>154</sup>

As any publisher would do with a pitched book idea, the Senate Finance Committee is not about to take Astrue’s word for it.<sup>155</sup> They

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<sup>148</sup> *Social Security Testimony Before Congress: Statement of Michael J. Astrue Commissioner of Social Security*, SENATE FINANCE COMMITTEE, May 23 2007, [http://www.ssa.gov/legislation/testimony\\_052307.htm](http://www.ssa.gov/legislation/testimony_052307.htm) (last visited Dec. 20, 2010) [hereinafter “Testimony”].

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* By 2011, the Baby Boomer generation will start to reach the age of sixty-five. See *Press Release: Census Bureau Projects Doubling of Nation’s Population by 2100*, UNITED STATES CENSUS BUREAU, Jan. 13, 2000, available at <http://www.census.gov/Press-Release/www/2000/cb00-05.html>. By 2030, the Baby Boomers will have finished reaching sixty-five. *Id.* As this group begins to retire in 2011, there will be 40.4 million seniors (or 13% of the population) and will grow to 70.3 million (20% of the population) by 2030. *Id.*

<sup>152</sup> TESTIMONY, *supra* note 148.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* A committee in Congress works in the shadows in finalizing every detail for a piece of legislation. *History of the Finance Committee*, SENATE

want a specific game plan; they want to know each proposed detail down to its core in order to ensure that any financing, whether additional or not, is put to good use. Astrue, in recognition of this, summarized the primary purpose of his visit, “[T]oday, I want to share with you a number of important steps we have taken, will take, or are contemplating taking in the near future to better manage our workloads.”<sup>156</sup> The commissioner highlighted four steps that he believes will eliminate the application and appeals backlog: (1) compassionate allowances, (2) improved hearing procedures, (3) increased adjudicatory capabilities, (4) increased efficiency through automation and business processes.<sup>157</sup>

In the area of improving hearing procedures, the commissioner stated that, on October 1, 2006, the administration had 63,000 cases that were a minimum of 1,000 days old.<sup>158</sup> Having to wait three to

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FINANCE COMMITTEE, <http://www.finance.senate.gov/history.pdf> (last visited Dec. 20, 2010). The rationale behind the existence of committees is as follows: if Congress deals with potential legislation that can affect the entire nation, it is of the utmost importance that a thorough, informed review be conducted prior to a formal vote in the Senate. *Id.* The Senate committees consult experts in the respective fields throughout this process. *Id.* These committees are also there to inform, assist, and examine any legislation that an outside senator (not a member of the committee) has proposed. *Id.* Moreover, the committee has an oversight responsibility and has the authority to investigate, review, and evaluate the effectiveness of existing laws in the committee's respective field. *Id.* Two of the most frequently asked questions by a Senate committee include: how well is a particular agency of the executive branch administering the legislation enacted by the Congress and what changes could be enacted to improve it? HISTORY OF FINANCE COMMITTEE, *supra* note 156. In fact, this is exactly what the Senate Finance Committee is doing as it hears testimony from Astrue over the proposed overhaul in Social Security disability. *Id.* Social Security disability is a major focus of the Senate Finance Committee. *Id.* The Senate Finance Committee, is by regulation, included in any proposed legislation, messages, petitions, memorials, and any other matters relating to: (1) bond debt of the United States; (2) customs, collection districts, and ports or entry and delivery; (3) deposit of public money; (4) general revenue sharing; (5) health programs under the Social Security Act and health programs financed by a specific tax or trust fund; (6) national social security; (7) reciprocal trade agreements; (8) revenue measures generally; (9) revenue measures relating to insular possessions; (10) tariffs and import quotas; and (11) transportation of dutiable goods. *Id.*

<sup>156</sup> TESTIMONY, *supra* note 148.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

four years for their day in court, applicants have been continually frustrated by the system.<sup>159</sup> Astrue remarked that due to a reallocation of resources and redefining of goals, the administration has, within a single year, been able to reduce the backlog of 1,000-day-old cases by almost 80%, dropping the number to 14,000.<sup>160</sup> As far as increasing adjudicatory capabilities, the administration has provided a more thorough and descriptive means of allocating resources. First though, Astrue emphasized that any progress in this area will be primarily be the result of hiring additional administrative law judges.<sup>161</sup> The logic is simple: the greater number of administrative law judges, the greater number of cases that can be heard, and the greater the reduction of backlogs.

Given this, there are still other areas that can be improved in order to maximize administrative law judges' capacities to hear and decide cases more efficiently.<sup>162</sup> Astrue noted that while the backlog consists of applicants awaiting a hearing, there is significant behind-the-scenes work that must take place before that hearing can be held.<sup>163</sup> In compiling the requisite case file, the administration hopes to "streamline" this process: "[W]e will streamline the folder assembly portion of case preparation to limit file assembly to a cover sheet and numbering pages sequentially."<sup>164</sup> Moreover, the largest backlogged offices will become the center of attention.<sup>165</sup> The initiative plans to send volunteers from field offices to hearing offices to assist in the formulation of the case files.<sup>166</sup> In addition, 5,000 overtime hours per month will be solely dedicated to this task,<sup>167</sup> reasoning that the cases that have been pending the longest have primarily been paper cases, as opposed to electronic cases.<sup>168</sup> As soon as these paper cases are adjudicated, they will be replaced with electronic files that are quicker to compile and easier to

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> TESTIMONY, *supra* note 148.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> TESTIMONY, *supra* note 148.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

maintain.<sup>169</sup> Improving the behind-the-scenes efficiency will allow administrative law judges to operate at full capacity, scheduling as many hearings as possible instead of waiting for cases as they are prepared.<sup>170</sup>

The administrative law judges themselves are also the subject of reform.<sup>171</sup> The SSA has gone from giving judges the discretion in using the "Finding Integrated Template" to mandating its use.<sup>172</sup> This template provides judges with an abbreviated decision format that effectively captures the important essentials in drafting a defensible opinion.<sup>173</sup> The commissioner noted that prior to the mandate of the template, 80% of all judges used it.<sup>174</sup> More importantly, this group of judges has had a lower rate of remand by the Appeals Council, giving judges more time to hear pending cases.<sup>175</sup> Further, the administration has sought to focus judges' work on the substantially backlogged offices.<sup>176</sup> However, simply assigning judges to one of the 142 offices nationwide is extremely inefficient and inflexible.<sup>177</sup> Instead, the administration proposes to reserve a number of administrative law judges to a central office so that they may solely conduct hearings across the nation via video conferencing.<sup>178</sup>

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> TESTIMONY, *supra* note 148.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> TESTIMONY, *supra* note 148.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* The following citation provides statistics regarding the breakdown of how each office has conducted their hearings, in person or over video conferencing. *Public Use Files: Hearings Held-In Person or Via Video Conferencing Fiscal Year 2010*, SOCIAL SECURITY ADMINISTRATION, [http://www.ssa.gov/appeals/DataSets/06\\_Hearings\\_Held.html](http://www.ssa.gov/appeals/DataSets/06_Hearings_Held.html) (last visited Dec. 20, 2010). An interesting point here is that Commissioner Astrue's plan should reveal that the more backlogged an office is, the more they should be employing video conferencing or having their cases heard from the central office via video conferencing. However, a quick look at the statistics has not seemed to support this notion. *Public Use Files: Hearing Office Workload Data Fiscal Year 2010*, SOCIAL SECURITY ADMINISTRATION,

Video conferencing is one highlighted piece of technology that Astrue believes will increase efficiency through the use of automation and business processes.<sup>179</sup> Some of the proposed features include: ability to sign decisions electronically at the hearing level, shared access to electronic cases from office to office, video conferencing available in all hearing rooms, and ePulling (a computer program designed to expedite the case preparation process).<sup>180</sup> Changes in case management are also part of the commissioner's plan.<sup>181</sup> For example, if a case goes to decision at an administrative law judge hearing and is then successfully appealed to the Appeals Council, the Council is strongly encouraged to issue a final decision as opposed to remanding to another administrative law judge.<sup>182</sup> Further, the administration is seeking to provide more oversight and accountability throughout the entire system.<sup>183</sup> Initiating a "quality assurance program" will enable the administration to get direct feedback from applicants.<sup>184</sup> The administration is also insistent on being more proactive in investigating allegations of misconduct by administrative law

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[http://www.ssa.gov/appeals/DataSets/02\\_HO\\_Workload.html](http://www.ssa.gov/appeals/DataSets/02_HO_Workload.html) (last visited Dec. 20, 2010). For instance, Cleveland, Ohio, according to these statistics, has the second highest backlog in the nation with over 10,000 cases pending. *Id.* However, from the beginning of Fiscal Year 2010 to December 2009, Cleveland has heard just ninety-one cases via video conferencing while deciding over 1,000 cases in person. *Id.* On the other hand, Charlestown, West Virginia is about middle of the pack with 5,000 pending cases. *Id.* Charlestown has heard three times as many cases via video conferencing as opposed to live hearings. *Id.* These statistics lead to the conclusion that more training needs to be done with judges in order to familiarize them with the technology. Since all offices are equipped with the technology, there is no excuse for not taking advantage of it.

<sup>179</sup> TESTIMONY, *supra* note 148.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* This oversight and accountability has also been pushed by President Obama's **Transparency and Open Government** initiative. *Memorandum for the Heads of Executive Departments and Agencies: Transparency and Open Government*, THE WHITE HOUSE, [http://www.whitehouse.gov/the\\_press\\_office/TransparencyandOpenGovernment](http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment) (last visited Dec. 20, 2010).

<sup>184</sup> TESTIMONY, *supra* note 148.

judges.<sup>185</sup> Overall, with new technology to increase judicial capacity and more measures in place to monitor the current system, Astrue is convinced the initiative is well worth the Senate Finance Committee's attention and support.<sup>186</sup>

Commissioner Astrue garnered the necessary support from the Senate Finance Committee in launching the Compassionate Allowances initiative.<sup>187</sup> Astrue provided a thorough description of the program and offered his insights and analysis in looking towards the future.<sup>188</sup> One area that was addressed was the expansion of the initial Compassionate Allowances list.<sup>189</sup> As it currently stands, there are fifty medical conditions, twenty-five cancers and twenty-five diseases, which allow applicants to have their claims expedited.<sup>190</sup> Though innovative, the list, combined with the Quick Disability Determination program, only has a significant impact on an estimated six to nine percent of all applicants.<sup>191</sup>

Additions to the list are anticipated.<sup>192</sup> Prior to the launch of the initiative, the initial list was determined, in part and among other things, from information given at two public outreach hearings.<sup>193</sup>

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.* In the commissioner's own words,

Mr. Chairman, when it comes to disability backlogs, there is no single magic bullet. Our goal is to slow the growth of cases pending until we reach a tipping point next year with the addition of a substantial number of ALJs who can begin to help us drive the backlog down. With better systems, better business processes, and better ways of fast-tracking targeted cases, we hope to return to the more manageable levels we experienced at the beginning of this decade. This task won't be easy, and it won't be possible at all without your continued support for adequate funding for this effort.

*Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> TESTIMONY, *supra* note 148.

<sup>191</sup> LAUNCH COMPASSIONATE ALLOWANCES, *supra* note 11.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* On December 4 and 5 of 2007, there were public hearings regarding diseases in Washington, D.C. *Id.* On April 7, 2008, there was a public hearing on cancers at the Broad Institute Auditorium of the Massachusetts Institute of Technology in Boston, Massachusetts. *Id.*



Three public hearings have been held since in order to consider adding certain diseases to the list.<sup>194</sup> The first was in December of 2008 concerning brain injuries and strokes.<sup>195</sup> In June of 2009, a hearing was held for early onset Alzheimer's disease and other related dementias.<sup>196</sup> The last hearing was held on November 18, 2009 and dealt with Schizophrenia.<sup>197</sup> While the administration has yet to officially include any of these diseases in the Compassionate Allowances list, it nevertheless serves as a viable platform to incorporate public awareness as Social Security continues to expand this initiative in the coming years.

### B. *Has it Worked?*

With all the extensive work that been put into developing, launching, and implementing one of the biggest overhauls in Social Security disability history, one would inevitably wonder about its success. Has it made as much of an impact as was expected? While the SSA does indeed track and monitor just about every statistic available – from the demographics of disability award recipients to the number of applications filed per age group – it does not provide any specific information pertaining to measures that would help evaluate the compassionate allowance initiative.<sup>198</sup> Of course, this can be explained by time. The administration's annual report for 2009 is set to be released sometime in July of 2010, while Compassionate Allowances were announced in October of 2008.<sup>199</sup> The extent of the impact of the Compassionate Allowances initiative will have is still to be determined, pending the release of relevant statistics and facts. However, looking at the information that is already available, it appears that, at a minimum, the Compassionate

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<sup>194</sup> LAUNCH COMPASSIONATE ALLOWANCES, *supra* note 11.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> See generally *Fast, Facts & Figures About Social Security 2010*, SOCIAL SECURITY ONLINE, [http://www.socialsecurity.gov/policy/docs/chartbooks/fast\\_facts/index.html](http://www.socialsecurity.gov/policy/docs/chartbooks/fast_facts/index.html) (last visited Dec. 20, 2010).

<sup>199</sup> *Id.*

Allowances initiative, among other things, has been a key component in attacking the current disability backlog.<sup>200</sup>

On September 30, 2009, Commissioner Astrue proudly announced that for the first time in a decade the administration ended the year with fewer pending disability hearings than it began.<sup>201</sup> At the start of the 2009 fiscal year, which runs from October to September, the administration had 760,813 pending hearings.<sup>202</sup> At the end of the fiscal year, it reduced those pending cases by more than 37,000 to 722,822.<sup>203</sup> Moreover, during this time period, the average wait time for an administrative hearing decreased from 514 days to 491 days.<sup>204</sup> While the commissioner remarked that this result is largely due to the increased funding and proper expenditures made by the administration, it would be a fallacy to conclude that the Compassionate Allowances initiative did not play its part.<sup>205</sup>

Backlogs start and continue to grow when applicants are denied in the initial disability decision. These denied applicants are then placed amongst the flood of applicants who choose to appeal. With Compassionate Allowances, fifty medical conditions are being recognized, expedited, and determined to qualify as per the definition of "disabled." Whereas such cases in the past might find their way amongst the overflow of appeals, now these cases are quickly resolved. Commissioner Astrue estimated that Compassionate Allowances, along with the Quick Disability Determination software, would affect six to nine percent of all applicants.<sup>206</sup> Granted, it cannot be assumed that all applicants would have either been initially denied or appealed under the old system, but it is accurate to say that a significant portion of the applicants that would have previously increased the group of pending hearings are no longer doing so.

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<sup>200</sup> *Social Security Hearings Backlogs Down For The First Time in Decade, Productivity and Processing Times Also Improve*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/pressoffice/pr/hearings-backlog-pr.htm> (last visited Dec. 20, 2010).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> BACKLOGS DOWN, *supra* note 200.

<sup>206</sup> LAUNCH COMPASSIONATE ALLOWANCES, *supra* note 11.

## V. EXISTING PROBLEMS WITH SOCIAL SECURITY DISABILITY

The Compassionate Allowances initiative is arguably the biggest reform ever in Social Security disability history. The initiative has been successful, significant, and, most importantly, necessary. Given the backlogged state of Social Security disability and its sometimes fatal repercussions, the reform was long overdue. But, to brush one's hands off and call it a day is not what the SSA should do. With a successful launch of the Compassionate Allowance initiative, with increased funding from President Obama's administration, with a decrease in pending hearings, and with an increase in productivity, Social Security disability awareness is at all time high. The administration should seize this opportunity and continue its overhaul of the system. Compassionate Allowances are innovative and important but, being as they impact only a small fraction of the system's applicants, they are only a start.

The following subheadings provide a critique of the current system and, where applicable, propose certain solutions.

### A. *The 2/3rds Problem*

How do you tell if a government-run program is using its resources efficiently? There are lots of ways: one can look at the number of applications compared to the number of benefits awarded; one can pinpoint the average wait for an initial disability decision or average wait for a hearing before an administrative law judge; one can focus on the flooded number of applications awaiting their day in court. In fact, the Social Security Disability website maintains a whole host of statistics pertaining to applications and benefits.<sup>207</sup> Though informative, these statistics do not provide much more insight than what appears on the surface.

In a New York Times article entitled "Disability Cases Last Longer as Backlog Rises" a telling revelation is made: "Two-thirds of those who appeal an initial rejection eventually win their cases."<sup>208</sup>

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<sup>207</sup> FAST, FACTS & FIGURES, *supra* note 198.

<sup>208</sup> Erik Eckholm, *Disability Cases Last Longer as Backlog Rises*, N.Y. TIMES, Dec. 10, 2007, [http://www.nytimes.com/2007/12/10/us/10disability.html?\\_r=1](http://www.nytimes.com/2007/12/10/us/10disability.html?_r=1) (last visited Dec. 20, 2010). This two-thirds statistic is later confirmed in a more recent article. HERBECK, *supra* note 10.

Author Erik Eckholm is surprisingly unfazed by such a fact. His article focuses on the administration's plan to hire new judges to reduce the backlog as frustrated patients continue to wait for their hearing.<sup>209</sup> Combine this fact with Ms. De La Cruz's comment on the system as she fought for her brother – "[T]he system is designed for people to get frustrated and give up." – and there is a reasonable, yet shocking, inference to be made.<sup>210</sup> Is Social Security Disability purposely and intentionally crafted to curtail benefits to applicants? Are some applicants being intentionally denied initially in the hope that they become frustrated and give up, even when such applicants are meeting the listed requirements? It appears that winning a disability case involves more than just filing a timely application with a "severe" and disabling medical condition. It requires patience, and lots of it.

If the administration is not harboring ulterior motives with the design of the application process, then the two-thirds statistic nevertheless should be overwhelming evidence that there is a problem that needs to be addressed. Even Randy Frye, an administrative law judge from Charlotte, North Carolina, notes, "I wouldn't say it's frequent, but it is routine. Every month, most judges see a case that should have been paid at the first level. There are cases where it's obvious."<sup>211</sup> Though there are a few reasonable explanations for the two-thirds statistic,<sup>212</sup> it does not eradicate the belief in reform.

When two-thirds of appeals are eventually overturned, the manner in which the initial decisions are made for Social Security applicants becomes increasingly suspicious. If a superior court judge is overturned by its state appeals court, it may amount to a new

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<sup>209</sup> ECKHOLM, *supra* note 208.

<sup>210</sup> PARKER-POPE, *supra* note 1.

<sup>211</sup> HERBECK, *supra* note 10.

<sup>212</sup> First, there could be a distortion of the statistic due to a sampling pool problem. The applicants that are most likely to appeal are the ones that truly believe in the merit of their cases. Whether or not their belief matches up to actual reality is another issue. But, the statistic, due to the sample problem error, is likely enlarged. But, even with this explanation, it can only account for a fraction of the alarming statistic. Second, there are some cases, due to lack of medical evidence, which can be denied initially. Upon gathering such pertinent evidence, a case will get decided appropriately at the hearing level. Once again, this may provide an explanation for part of the statistic but not in entirety.

interpretation of the law or might just be a polite slap in the face. In any event, a written opinion is provided and proper inquiry reveals the reasoning behind the decision. Not only is there a concern with getting the decision correct, but there is a concern with transparency to ensure the system is designed to guide future cases such that the lawsuits may be resolved at the trial court level. This judicial system is designed to maximize efficiency. SSA's decision making process has failed to emulate such a structure. Given the level of funding and the current backlogged system, this two-thirds statistic is inexcusable, unjustifiable, and downright disturbing.

In responding to this alarming statistic, the administration ought to conduct a thorough investigation into the causes of the overturned cases. By tracking the reasons of the initial rejection and subsequent successful appeal, a causal relationship may be identifiable. Whatever the cause though, a few initiatives would be well served to be instituted.

First, the administration should focus on the initial application. Randy Frye articulates the logic: "If you approve the meritorious applications when they are first filed, you cut into the backlog for hearings."<sup>213</sup> Much attention should be given to make sure each application is complete and not void of any matter that may lead to an initial technical rejection. Second, Compassionate Allowances provide a bright-line rule for determining when certain medical conditions automatically qualify as severe and disabling. As a result, it takes the discretion away from reviewers and judges and makes for a more predictable and fluid system. Though medical conditions can differ from person to person, the administration should, at a minimum, tier medical conditions by severity. An extremely severe condition ought to require less of a showing of medical evidence, while a less severe condition should require a higher threshold of evidence. Such a system would provide much needed structure, making it less susceptible from being manipulated at the discretion of an individual reviewer. By designating resources up front in the application process, the administration can launch a preemptive strike before winnable applications get tossed into the appeals process.

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<sup>213</sup> HERBECK, *supra* note 10.

### B. *Economic Incentive to Appeal*

Another possible cause of the backlog can be derived from examining the behaviors of the applicants. Why would an applicant file an appeal after an initial rejection? Is it because the applicant believes they have a medical condition that qualifies? Is it because they are aware that two-thirds of cases that are appealed get overturned? Or maybe it is because, in some instances, it is in the best interest of the applicant to appeal regardless of how frivolous the appeal might be?

Suppose a disability recipient is undergoing a continuing disability review.<sup>214</sup> Should the administration find that the recipient is no longer disabled and deserves a reduction or elimination of benefits, the recipient is entitled to an appeal.<sup>215</sup> However, during this appeal, the recipient will continue, upon request, to receive benefits to the amount given prior to the continuing disability review.<sup>216</sup> But that alone does not sustain this bad incentive; it is also a combination of the penalty or lack thereof. Should such a recipient choose to file an appeal and eventually lose that appeal, the imposed penalty is that the government will ask you to pay back some or all of the money.<sup>217</sup> But, should the recipient cooperate with the administration during appeal and have it determined that money is needed for usual living expenses, the administration will not ask to be repaid.<sup>218</sup>

Another factor that needs to be considered here is the demographics of the recipients, or, more specifically, their income levels. Is it reasonable to expect recipients who request continued benefits throughout the first two stages of appeal<sup>219</sup> will be in the financial position to repay the government should they be unsuccessful in their appeal? Many applicants may indeed be

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<sup>214</sup> CONTINUING DISABILITY REVIEWS, *supra* note 34.

<sup>215</sup> THE APPEALS PROCESS, *supra* note 60.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Your Right to Question the Decision to Stop Your Disability Benefits*, SSA Publication No. 05-10090, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/pubs/10090.html#4> (last visited Dec. 20, 2010).

<sup>219</sup> *Id.*

indigent, thereby defeating any deterrent raised by the existing pay back-penalty.

It is apparent that something needs to be done so that a recipient's primary motivation in filing an appeal is based on merit and not dollars. To change this existing incentive, the administration can do the following: it can look to apply incorrect benefits retroactively; it can take away the right of recipients to receive benefits throughout appeals; and, should a recipient win its case on appeal, the administration can retroactively apply the benefits the recipient was entitled to. With such a system, the administration will pay out fewer benefits, hopefully hear fewer appeals, and no longer have to hope of getting repaid in the event of a successful appeal. However, a noticeable criticism and potential problem may be present. Stopping benefits during appeals might also pose a Due Process violation.<sup>220</sup> Also, maybe it is the people's preference that

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<sup>220</sup> In *Kelly*, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment required an evidentiary hearing before a welfare recipient could be stripped of their cash benefits. *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970). The Court also remarked that while the recipient is not entitled to a trial, they are entitled to an oral hearing decided by an impartial decision-maker. *Id.* at 267. This is done to allow the recipient the right to confront and cross-examine witnesses and the right to a written opinion describing the evidence and reasoning in justifying the decision. *Id.* However, this decision was superseded by statute. *State v. W. Va. Dep't of Health & Human Res.*, 212 W. Va. 783 (2002). In 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation and, in conjunction therewith, created the Temporary Assistance to Needy Families (TANF) program. *Id.* at 787. This program brought many changes. *Id.* One of which was that Congress labeled the program's assistance under "TANF" as not an "entitlement" and it would terminate after sixty months. *Id.* The petitioners tried to argue that there is a constitutional right to a pre-termination hearing as was decided in *Kelly*. *Id.* at 792. The Court shot down this argument claiming there was no constitutional right as Congress had changed it so that welfare cash benefits were no longer an "entitlement." *Id.* While it is true that this discussion concerns welfare benefits and not Social Security benefits, the result is nonetheless the same in that context. In *Flemming*, the United States Supreme Court held that there was no "contractual right" to receive Social Security payments. *Flemming v. Nestor*, 363 U.S. 603, 612 (1960). Because there was no contractual right, payments were not protected by the Takings Clause of the Fifth Amendment. *Id.* The interest that a recipient has in Social Security payments is protected by Due Process Clause analysis. *Id.* However, the Court stated that a government action is valid unless it is patently arbitrary and utterly lacking in rational justification. *Id.* at 611. Given my analysis in the respective section, eliminating benefits during appeal would not be considered patently arbitrary and

recipients not be “left in the dark” during the appeals process. The criticism represents a value judgment call, impossible of satisfaction. However, it should be noted that after a recipient’s benefits are stopped, they continue for three months after the date that their disability ends.<sup>221</sup> This provision should be more than enough for recipients to find work or look to other government programs, like unemployment or welfare, for assistance.

### C. *Emergency Hearings*

Eric De La Cruz’s death is partly, if not entirely, to blame due to his encounter with an inflexible, rigid system. In fact, his sister, a former CNN anchor, did everything she could possibly do given the circumstances:<sup>222</sup> she lobbied to get her brother’s administrative law judge hearing expedited; she raised over a million dollars with the help of national celebrities, Tony Hawk and Trent Reznor; and she raised public awareness for the cause (as evident by her following of thousands on the social networking website, Facebook.com).<sup>223</sup> In retrospect, how could the SSA force Eric to wait in a line when his life was quickly fleeting? Or, as Eric’s sister, Veronica De La Cruz, put it, “How can a sick person navigate the system? I am healthy and can barely do it on my own.”<sup>224</sup>

The need for some type of emergency hearing format, allowing applicants with bleak medical outlooks a quicker scheduled hearing, is obvious. The administration has, in fact, already shown they are capable of this through the Compassionate Allowances initiative. However, what happens to the applicants that are ironically not so lucky to have one of the listed medical conditions? As of right now, that answer is painfully clear: they are left with no recourse but to wait. There is no excuse for this lack of recourse. Out of the 142 hearing offices nationwide, the most productive office, Harrisburg,

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utterly lacking in rational justification. Therefore, Social Security disability could enact a provision that stays benefits during the course of an appeal.

<sup>221</sup> GETTING DISABILITY BENEFITS, *supra* note 87.

<sup>222</sup> PARKER-POPE, *supra* note 126.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*



Pennsylvania is making 3.92 decisions on cases per day per judge.<sup>225</sup> Contrast this figure with the 15% of offices nationwide making two or fewer decisions on cases per day per judge.<sup>226</sup> What is the additional cost of adding another case here and there sprinkled throughout the course of a year? If the administration has to push the pending hearings a single day (that lack emergency merit) to save someone's life, is it not worth it? Moreover, the administration can screen the emergency requests. Whatever the method may be, the need for such a format is evident and imperative in preventing another death because the system is too rigid and unmanageable.

#### D. *Baby Boomer Generation*

The urgency of continuing disability reform, if not evident now, will be apparent in the upcoming years. The "baby boomer" generation, dated from 1946 to 1964, is a term associated with an immense increase in births following the end of the World War II.<sup>227</sup> As young soldiers made their way back from the war and started their families, an increase of births occurred at unprecedented rates.<sup>228</sup> In fact, individuals from the baby boomer generation number seventy-eight million and represent over a quarter of United

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<sup>225</sup> *Public Use Files: Hearing Office Dispositions Per ALJ Per Day Rate Ranking Report*, SOCIAL SECURITY ADMINISTRATION, [http://www.ssa.gov/appeals/DataSets/04\\_Disposition.html](http://www.ssa.gov/appeals/DataSets/04_Disposition.html) (last visited Dec. 20, 2010).

<sup>226</sup> *Id.*

<sup>227</sup> *Baby Boomer Generation: Social Issues 1946-1964*, UNITED STATES HISTORY, <http://www.u-s-history.com/pages/h2061.html> (last visited Dec. 20, 2010). During this time, Canada and England also experienced a sharp increase in their national birthrates. *Id.* In Canada, individuals born during this time period are referred to as the "boomies," while the generation in Great Britain is known as the "bulge." *Id.* Any administration looking to put someone in the White House or Congress ought to carefully decide what and how their proposed stances will affect the baby boomer generation. *Id.* Because the baby boomer generation makes up such a significant portion of the nation's population and because seniors' participation in voting and politics is the best among age groups, any candidate must be sure not to alienate them. *Id.* In the 2000 election, Bush was able to win Florida, and thus the presidency, due to the high number of senior citizens he secured votes from. *Id.* It follows as well that this group will have much more of an impact in the future than just its influence on Social Security.

<sup>228</sup> BABY BOOMER GENERATION, *supra* note 227.

States' current population.<sup>229</sup> The first baby boomers will be sixty-five in 2011.<sup>230</sup> And, as this group begins to retire in 2011, there will be 40.4 million seniors (or 13.0 percent of the population) and will grow to 70.3 million (20.0 percent of the population) by 2030.<sup>231</sup>

The conclusion drawn from these statistics is this: disability applications will almost certainly continue to rise into the foreseeable future. If the number of applications rises, then one can expect the fight against the backlog to become a much more time intensive and financially consuming task. The rationale in addressing the two-thirds problem is the same rationale observed here. The administration needs to launch a preemptive strike by addressing reform before the rise in applications become too burdensome from an already heavily taxed administration.

#### E. *Performance Evaluations of Administrative Law Judges*

In a 1993 Administrative Law Journal Article entitled "The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluations for ALJs," Jeffrey S. Lubbers advocates for a modification of the flat statutory exemption of Administrative Law Judges (ALJ) from the performance appraisal system.<sup>232</sup> As it currently stands, 5 U.S.C. § 4301(2)(D) exempts ALJs from the definition of "employee" for purposes of performance appraisals.<sup>233</sup> Thereby, a particular agency wanting to either discipline or remove one of its ALJs is required to bring the matter before the Merit Systems Protections Board (MSPB) to show good cause for such action.<sup>234</sup> And, as Lubbers points out, this is quite a difficult task:

The statutory ban on ALJ 'performance appraisals' and the even broader longstanding CSC [Civil Service Commission]/OPM [The Officer of Personnel Management] rule that '[a]n agency shall not

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<sup>229</sup> U.S. CENSUS BUREAU, *supra* note 151.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluations for ALJs*, 7 ADMIN. L.J. AM. U., 589 (1993).

<sup>233</sup> *Id.* at 590.

<sup>234</sup> *Id.* at 592.

rate the performance of an administrative law judge,' when combined with the high threshold of proof demanded by the MSPB for charges brought against ALJs on productivity grounds, have made it very difficult for agencies to exert managerial control over their ALJs.<sup>235</sup>

There is a constant tension between the current Social Security disability system and the seemingly immune ALJs. The administration has hired more judges, implemented video conferencing, and has taken other measures in combating the backlog.<sup>236</sup> However, the common sense solution of forcing judges to be more productive, and thus resolving more cases, is not necessarily a viable option. Though according to Randy Frye, an administrative law judge, this is what is happening: "Right now, the only pressure we get from Washington is to push the cases through the system. That seems to be the only priority."<sup>237</sup> However, Mark Nickle, a national spokesman for the administration, disagrees: "There are no pressures, goals or quotas for judges."<sup>238</sup> Whatever the working environment may actually be between the administration and the ALJs, one thing is certain: any attempt by the administration to exert managerial control is largely ineffective.

There is a long-standing history and rationale for keeping ALJs immune from political pressure.<sup>239</sup> Judges have been relatively immune from outside pressures in order to maintain an appearance of judicial independence and fairness.<sup>240</sup> Being appointed and not elected, as well as basing compensation off seniority as opposed to performance, are two measures that protect judicial independence.<sup>241</sup> While it is important for ALJs to continue to decide cases based upon the applicable law and individualized facts, complete independence and a subsequent lack of accountability can be seen as a partial cause for an inefficient system.

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<sup>235</sup> *Id.*

<sup>236</sup> BACKLOGS DOWN, *supra* note 200.

<sup>237</sup> HERBECK, *supra* note 10.

<sup>238</sup> *Id.*

<sup>239</sup> See LUBBERS, *supra* note 232.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 590.

As noted above, the only recourse that the administration has for disciplining and removing ALJs comes via the Merit Systems Protections Board ("MSPB").<sup>242</sup> However, Lubbers argues that this "weapon" is limited:

[I]t seems clear that the MSPB procedure is a sufficient "weapon" against ALJs engaged in misconduct or insubordination. The difficulty with the disciplinary process comes with respect to cases involving low productivity or inefficiency. In these cases, all involving the SSA, the agency has been unsuccessful in its cases before the MSPB.

In the trilogy of SSA-ALJ productivity cases decided by the MSPB in 1984, the agency brought to the MSPB what it considered to be evidence of unacceptably low productivity. In the lead case n61, SSA produced evidence that the judge's disposition rate for the years 1980-81 was fifteen to sixteen cases per month, compared to an average of thirty to thirty-two for all SSA ALJs. In addition, his average monthly "pending" caseload for 1981 was sixty-four, compared with 178 for all SSA ALJs. After a hearing, the MSPB ALJ rejected the ALJ's legal defenses a[nd] recommended dismissal.

Though the MSPB has not explicitly prohibited bringing such a charge against an ALJ, it is highly unlikely the administration would be successful.<sup>243</sup> In fact, the SSA has not brought such a cause of action since these cases in 1984.<sup>244</sup> In the trilogy of the SSA-ALJ productivity cases, the Court wanted more information regarding the specific cases that the alleged low-productivity judge had heard.<sup>245</sup> The Court could not rule out the possibility that the cases were more complex thus explaining for the smaller workload.<sup>246</sup>

For all practical purposes, the administration has little, if any, managerial control over ALJs, their productivity, and their workload. However, perhaps the administration does not need to exert managerial control for there to be some accountability and performance evaluations in ALJ field. Lubbers points out the internal peer review system for ALJ misconduct in the form of the

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<sup>242</sup> *Id.* at 598.

<sup>243</sup> *Id.* at 598-99.

<sup>244</sup> LUBBERS, *supra* note 232 at 600.

<sup>245</sup> *Id.* at 599.

<sup>246</sup> *Id.*

Officer of Hearings and Appeals (“OHA”) of the Social Security Administration.<sup>247</sup> The OHA fields and investigates claims from dissatisfied applicants.<sup>248</sup> The complaint is reviewed by the Regional Chief Administrative Law Judge who forwards a report to the OHA headquarters and the Chief Administrative Law Judge, who determines whether an investigation is necessary.<sup>249</sup>

A similar peer review panel designated for low productivity and judicial performance evaluations would be a fruit-bearing initiative.<sup>250</sup> Giving the Chief ALJs in the administration the responsibility of developing case processing guidelines would speak to ALJ productivity and provide time goals for each judge.<sup>251</sup> The Chief

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<sup>247</sup> *Id.* at 601.

<sup>248</sup> *Id.* at 605.

<sup>249</sup> Procedures for Internal Handling of Complaints of Misconduct or Disability, 52 Fed. Reg. 32973 (Sept. 1, 1987).

<sup>250</sup> LUBBERS, *supra* note 232 at 604-05.

<sup>251</sup> *Id.* As Lubbers notes, evaluation programs for ALJs already exist at the federal and state court levels. *Id.* at 607. Further, the American Bar Association has issued guidelines regarding the proper inquiry: “The ABA Guidelines recognize that ALJ evaluation programs should be “structured and implemented so as not to impair the independence of the judiciary.” *Id.* The list compiled is shown below.

- (1) *Integrity* -- avoidance of impropriety and appearance of impropriety, freedom from bias, impartiality;
- (2) *Knowledge and understanding of the law* -- legally sound decisions, knowledge of substantive, procedural and evidentiary law of the jurisdiction, proper application of judicial precedent;
- (3) *Communication skills* -- clarity of bench rulings and other oral communications, quality of written opinions, sensitivity to the impact of demeanor and other non-verbal communications;
- (4) *Preparation, attentiveness and control over proceedings* -- courtesy to all parties, willingness to allow legally interested persons to be heard unless precluded by law;
- (5) *Managerial skills* -- devoting appropriate time to pending matters, discharging administrative responsibilities diligently;
- (6) *Punctuality* -- prompt disposition of pending matters and meeting commitments of time according to rules of court;
- (7) *Service to the profession* -- attendance at and participation in continuing legal education, ensuring that the court is serving the public to the best of its ability;
- (8) *Effectiveness in working with other judges* -- extending ideas and opinions when on multi-judge panel, soundly critiquing work of colleagues.

*Id.* at 608.

ALJs would conduct annual reviews of each ALJ.<sup>252</sup> If any disciplinary action is required, then the Chief ALJ would bring charge on behalf of OPM to the MSPB.<sup>253</sup> If commendations are in line, then the Chief ALJs should nominate outstanding ALJs for some nonmonetary award.<sup>254</sup> The Chief ALJs would be appointed and removed subject to the approval of the OPM and have salaries and increases fixed by statute in order to preserve the independence and immunity from outside pressures.<sup>255</sup> Before any of this can be accomplished, however, Congress must repeal 5 U.S.C. § 4301(2)(D), prohibiting ALJs from being subjected to performance evaluations.

Performance evaluations are a necessary evil. Some ALJs already claim that they are being “pressured” by SSA to rush through cases when they believe more inquiry would be in the best interest of both taxpayers and applicants.<sup>256</sup> But, what exactly do they mean by “pressure?” As demonstrated above, the administration has no ability to interfere with ALJs and their workload. Moreover, an increased focus on getting the initial decisions correct and fixing the two-thirds overturned statistic would give ALJs less reason to hesitate in using their time more efficiently. In an ideal world, ALJs would have an infinite amount of time to research applicants’ medical conditions, rendering independent and just holdings. Unfortunately, given how backlogged the system currently is and given the impending baby boomer generation problem, that is neither feasible nor wise. Public awareness and support are critical in order to repeal 5 U.S.C. § 4301(2)(D).

#### F. *Transparency of the Administration*

As newsworthy as the launch of Compassionate Allowances initiative has been, the far more interesting story is the length of time that it took for the initiative to pass. Why did it take so long for the SSA to react to a problem that had been plaguing the system for over

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<sup>252</sup> LUBBERS, *supra* note 232 at 604-05.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> HERBECK, *supra* note 10.

a decade? And, more importantly, will the public have to wait another ten years for this essential type of disability reform to continue? An inquiry into the surrounding circumstances that triggered the release of sensitive statistics will reveal much more than just numbers.

Statistics provide a way to measure, evaluate, and promote various subject matters. Statistics can be vital to garnering support for proposed legislation. Statistics can also be used to criticize current legislation, bringing attention to areas in need of reform. The two-thirds overturned statistic in this comment has served such a purpose. Though statistics can be manipulated to meet a particular agenda, the administration has not actively skewed statistics to meet its political agenda, but rather it is what the administration has not done that reeks of suspicion.

On the government website, the SSA provides a whole host of informative statistics: outcomes of applications for disability benefits, demographics of applicants, and the percentage of disabled workers who are receiving benefits represent just a small fraction of the thousands of pages of statistics available to the public.<sup>257</sup> Some tables date as far back as the 1960s.<sup>258</sup> It is evident that administration has intensely focused its attention on informing the public of its coursework – which makes it all the more surprising that statistics regarding the productivity of judges and disability offices, as well as the anticipated wait times for initial decisions and hearings, are so hard to come by. In fact, out of the entire content, excluding press releases and a single report, of the government’s website, only two lines are dedicated to addressing wait times.<sup>259</sup> The limited information is buried in its “Frequently Asked Questions” section. One section reads: “[I]t can take a long time to process an application for disability benefits (three to five months).”<sup>260</sup> Further, if one is diligent enough to find the outdated

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<sup>257</sup> FAST, FACTS & FIGURES, *supra* note 198.

<sup>258</sup> *Id.*

<sup>259</sup> See generally *Fast Facts and Figures About Social Security, Research, Statistics, and Policy Analysis*, SOCIAL SECURITY ONLINE, August 2010, [http://www.socialsecurity.gov/pgm/links\\_disability.htm](http://www.socialsecurity.gov/pgm/links_disability.htm) (last visited Dec. 20, 2010).

<sup>260</sup> *Length of Time It Takes to Receive a Disability Claim*, SOCIAL SECURITY ADMINISTRATION, <http://ssa-custhelp.ssa.gov/cgi->

anticipated appeals timeline, it reads: “[T]he average amount of time needed to process a hearing request during Fiscal Year 2007 (October 2006 through September 2007) was 512 days.”<sup>261</sup> The information is obsolete and appears to be purposefully overlooked and ignored.

This seemingly intentional and deliberate secrecy by the administration is currently the focus of change. President Obama, through the Transparency and Open Government initiative, has urged an “unprecedented level of openness” in government.<sup>262</sup> President Obama’s initiative is based upon the conviction that government should be transparent, government should be participatory, and government should be collaborative.<sup>263</sup> The SSA responded positively to the initiative, Commissioner Astrue stated, “I applaud President Obama’s commitment to creating an unprecedented level of openness in government and the new datasets we are posting far exceed what was asked of us.”<sup>264</sup> Exerting a defensive stance would have attracted undesirable public attention. It should be of no surprise that the administration gave up more than it was required, especially since doing so paints the administration in a cooperative, though false, light. In my opinion, if the administration had truly desired to become more transparent, it would have done so by its own initiative and without an encroaching presidential mandate.

In a news release on January 22, 2010, Commissioner Astrue highlighted some of the newly released Social Security datasets. Two in particular are extraordinary both in terms of their actual value and also their symbolic significance. First, for applicants who are currently awaiting their hearing, a dataset helps them to estimate expected wait times.<sup>265</sup> This level of information is unprecedented considering that applicants had been ignorant for so long. Second,

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[bin/ssa.cfg/php/enduser/std\\_alp.php?p\\_page=1&p\\_cv=1.105&p\\_pv=&p\\_prods=&p\\_cats=105](http://www.ssa.gov/policy/docs/colloquy/colloquy_03_04_05.html) (follow 6: “The length of time it takes to receive a disability claim” hyperlink) (last visited Dec. 20, 2010).

<sup>261</sup> *Id.*

<sup>262</sup> TRANSPARENCY & OPEN GOVERNMENT, *supra* note 183.

<sup>263</sup> *Social Security Makes New Data Available to Public*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/pressoffice/pr/dataset-pr.htm> (last visited Dec. 20, 2010).

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*



the administration released individual and collective statistics regarding casework efficiency.<sup>266</sup> The 142 disability hearing offices nationwide are now ranked according to ALJ dispositions per day per ALJ, by their average processing times, and by the number of cases pending.<sup>267</sup> Moreover, the individual ALJs are tied to their number of dispositions, total decisions, and type of decision (whether it was a total award, total denial, fully favorable, or partially favorable).<sup>268</sup> Other various pieces of information are also provided due to this new government initiative.<sup>269</sup>

Social Security disability transparency has seemingly been transformed overnight. The government initiative has been groundbreaking. An open and honest look into any government agency is essential to any successful reform. The ability to obtain direct evidence of a possible problem is the first step into raising public awareness and eventual support. Without the means to investigate a problematic area, how can one expect to bring about change? It is imperative to continued Social Security disability reform that the communication channels remain open between the administration and the public.

NOTE: *Health Care Overhaul*

The current health care overhaul may have a substantial effect on the importance of Social Security disability and impact of the Compassionate Allowances initiative. Social Security disability is just one of the programs available to Americans looking to obtain medical coverage. Recipients who have received disability benefits for 24 months are automatically enrolled in Medicare.<sup>270</sup> If President Obama is able to pass health care reform that no longer allows insurance companies to deny patients based on preexisting conditions, as was in Eric De La Cruz's case, then reliance on Social Security disability is not as significant. Moreover, if a public option

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<sup>266</sup> *Id.*

<sup>267</sup> NEW DATA AVAILABLE TO PUBLIC, *supra* note 263.

<sup>268</sup> *Id.*

<sup>269</sup> *Public Use Files: Hearings and Appeals*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/appeals/publicusefiles.html> (last visited Dec. 20, 2010).

<sup>270</sup> SOCIAL SECURITY DISABILITY BENEFITS, *supra* note 87.

is included, it is possible that Social Security disability could be scaled back considerably. A health care overhaul would certainly help to solve an ever present dilemma. As long as certain medical evidence is still necessary to win a Social Security disability case, what about those applicants that cannot afford a proper medical examination to accumulate this evidence? This is particularly troubling considering these individuals are the ones that are most likely to need disability benefits.

## VI. CONCLUSION

The Compassionate Allowance reform has been a step in the right direction. While its actual impact has been immediate for applicants with these recognized and listed diseases or medical conditions, its much greater impact is still to be determined. It took more than a decade filled with millions of frustrated applicants, not to mention a number of applicants who died awaiting hearings, before any substantial change was made. This frustration with the snail's pace of both the administration's ability to reform the system along with the unduly lengthy application process seems to support Veronica De La Cruz's notion that: "The system is designed for people to get frustrated and give up."<sup>271</sup> Thus, it should not be surprising that people have lost hope in the system. Applications with merit being denied for insufficient cause, a long history of case backlogs, along with an intentional lack of transparency have all been sources of disappointment in the system. The administration has a chance to change this and live up to the "compassionate" part of allowances. Otherwise, the Compassionate Allowances initiative should be regarded as a smokescreen, amounting for nothing more than a shield from additional public scrutiny.

"Trial and error" represents one of the most basic forms of learning.<sup>272</sup> Employing the trial and error method allows the user to select a solution, and then, through observation and adjustment for errors, perfect the system as best as possible with the given resources. R. R. Traill, in a scientific thesis for Brunel University

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<sup>271</sup> PARKER-POPE, *supra* note 1.

<sup>272</sup> Edward L. Thorndike, *Human Intelligence*, INDIANA UNIVERSITY, available at <http://www.indiana.edu/~intell/ethorndike.shtml> (last visited Jan. 4, 2011).

stated that “learning doesn't happen from failure itself but rather from analyzing the failure, making a change, and then trying again.”<sup>273</sup> In the realm of Social Security disability, the “trial”, or solution, for improving efficiency of the disability process has been the recently instituted Compassionate Allowances. Eric De La Cruz's life represents what is now the “error.” However, Eric's specific disease, dilated cardiomyopathy, is not covered by the initial or proposed additions of diseases on the Compassionate Allowances list.<sup>274</sup> Thus, the program, at this moment, would have no effect on people in Eric's dire circumstances. Absent public pressure, it is left up to the administration to determine whether this preventable death was an unfortunate and anomalous hiccup in the system, or rather, was a symbolic red flag that validates additional inquiry and further adjustment.

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<sup>273</sup> R.R. Traill & F.H. George, *Molecular Explanation for Intelligence—Including its Growth, Maintenance, and Failings*, BRUNEL UNIVERSITY THESIS, available at <http://bura.brunel.ac.uk/handle/2438/729> (1978).

<sup>274</sup> LIST OF CONDITIONS, *supra* note 132.