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The Honorable E. Clay Shaw, Jr.
Chairman, Subcommittee on Social Security
Committee on Ways and Means
House of Representatives

The Honorable Mac Collins
House of Representatives

Subject: Social Security: Review of Disability Representatives

The Social Security Administration (SSA) operates the nation's two largest programs providing cash benefits to people with severe long-term disabilities: the Disability Insurance (DI) program and the Supplemental Security Income (SSI) program. DI provides monthly benefits to insured workers who become disabled, while the means-tested SSI program provides monthly benefits to needy people who are aged, blind, or disabled. In fiscal year 1998, SSA received more than 3 million applications for DI and SSI benefits; and at year's end, more than 800,000 claims were pending an initial decision or an appeal hearing. From the time of application for benefits, many individuals who appeal to SSA's Office of Hearings and Appeals (OHA) wait well over a year for a final decision; a period that could impose considerable economic and psychological hardship for applicants and their families.

You have expressed concern about increasing complaints from SSA personnel that attorneys and other individuals representing disability applicants are often unprepared for disability hearings, causing delays in the adjudication process. You also have expressed concern that delays are often due to representatives' desire to maximize their fees, which are based on a percentage of past-due benefits paid to claimants. Accordingly, you asked us to determine (1) the extent to which disability representatives contribute to decisional delays, (2) other potential reasons for decisional delays, and (3) additional options available to SSA to ensure that disability decisions are reached in a more timely manner.

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GAO/HEHS-99-50R Disability Representatives

To conduct our work, we held discussions with key SSA headquarters officials, reviewed available national program performance data, and visited 4 of SSA's 10 regions (Atlanta, San Francisco, New York, and Philadelphia).¹ At these locations, we interviewed about 70 staff and managers from four OHA regional offices, seven local hearings offices, and three state Disability Determination Services (DDS) offices. We also reviewed a total of nearly 200 claimant case files provided to us by SSA that represented various stages of the disability determination process. To obtain the views of disability representatives, we met with officials from the National Organization of Social Security Claimants' Representatives (NOSSCR), an association of about 3,400 attorney and nonattorney disability representatives. We also interviewed representatives from a large law firm specializing in disability cases. We conducted our work between August 1998 and February 1999 in accordance with generally accepted government auditing standards.

In summary, due to the lack of agency data pertaining to disability representatives and limited case file documentation, we were unable to document whether representatives are regularly delaying disability proceedings in order to maximize their fees. However, many SSA staff and managers we interviewed believe frequent delays in disability proceedings are a significant problem and often attributable to the actions of some disability representatives. More specifically, we found that many of those interviewed were frustrated by disability program laws that provide numerous opportunities for representatives to submit new evidence in support of their client's claim throughout the entire process and hold SSA primarily responsible for adequately developing the evidentiary record, even when a claimant has representation. A number of administrative law judges (ALJ) also told us that, under current law, they could not hold incompetent or uncooperative representatives accountable for their actions and that contempt authority could be useful. In suggesting ways to address perceived attorney unpreparedness and delays, a number of SSA staff and managers argued that changes in the law underlying disability program policy were needed. However, the disability representatives we interviewed cautioned that significant changes to the laws governing this program were unnecessary and could place an undue hardship on individuals seeking benefits. Short of changes in the law, SSA currently does have some tools to influence representative behavior and deter delays. For example, SSA may reduce the fees of individuals who inappropriately delay proceedings or abuse program policies. SSA also recently implemented new standards of conduct regulations that allow for the suspension or disqualification of problem representatives. However, the

¹We selected SSA regions representing varied workload levels, case backlogs, and processing times. The selected offices also provided us with geographical dispersion.

new standards went into effect only recently, and SSA has yet to discipline any representatives under them.

BACKGROUND

SSA decides claims for DI and SSI benefits under title II and title XVI, respectively, of the Social Security Act. Applications for disability benefits for both programs may be filed at any of SSA's over 1,300 field offices. These applications, along with supporting medical evidence, are then forwarded to one of 54 state DDS offices for a medical decision. Claimants who are dissatisfied with the decision may request a reconsideration decision by the DDS. Those who disagree with this decision may appeal to SSA's OHA and have the right to a hearing before one of about 1,100 ALJs located in 132 hearing offices throughout the country. Individuals who disagree with the ALJ decision may pursue their claim with SSA's Appeals Council and ultimately may appeal to a federal district court. In fiscal year 1998, the average length of time for an initial decision at the DDS level was more than 70 days. From the time of appeal to OHA, the average wait for an ALJ decision was 341 days.

At each level of the disability determination process, applicants may be represented by an attorney or other individual in pursuing their claim. Over the last 20 years, the proportion of applicants with representation has nearly doubled; and in fiscal year 1997, about 70 percent of all cases decided at the ALJ-hearing level involved representatives. Disability representatives have been fairly successful in obtaining favorable disability decisions for their clients. In fiscal year 1997, the percentage of favorable hearing decisions for claimants with representation was about 58 percent, compared to 39 percent for individuals without representation.²

In general, disability representatives are compensated for their services through fee agreements authorized by federal statute. Fee agreements are formal documents signed by the claimant and representative that limit the fee charged by representatives to 25 percent of all past due benefits owed the claimant or \$4,000, whichever is less.³ No fee is charged if the claimant is ultimately denied

²Included in these percentages are other non-disability proceedings, such as black lung, retirement, and health insurance hearings.

³In some cases, representatives are paid via a fee petition, which is a more detailed itemization of services provided and time spent on a particular case. A fee petition allows for larger fees in cases that take longer to be decided by SSA, that involve a significant investment of time and resources by the representative, or both.

benefits. SSA's data show that the average fee agreement payment is about \$2,400. By law, SSA has the authority to ensure that representatives' fees are reasonable and in accordance with the services provided.

DATA INSUFFICIENT TO VERIFY STAFF CONCERNS
REGARDING DISABILITY REPRESENTATIVES

During our field visits, many staff and managers who we interviewed noted that delays in proceedings were a significant problem and were often attributable to the actions of some attorney and nonattorney disability representatives. However, we could find no definitive evidence from our review of SSA's disability program performance data and claimant case files that representatives were improperly delaying proceedings or that the presence of representatives led to delays.

SSA staff in the field generally complained that some representatives often showed up unprepared to represent their clients at hearings, did not adequately develop the evidentiary record, frequently requested unnecessary medical documents and consultative exams, and regularly engaged in last-minute submissions of evidence. They also noted that these behaviors were disruptive to the proceedings and contributed to decisional delays. In responding to the complaints voiced to us by SSA personnel, officials from NOSSCR and the head of a private law firm specializing in disability claims disagreed that representative unpreparedness and delays were a common problem. They argued that disability representatives are working legally and ethically within the existing system to present the best case for their clients. They also reiterated that the program was designed to be claimant friendly and nonadversarial⁴ with numerous opportunities for individuals to present evidence supporting their disability claim. They further expressed the view that quickly processing large volumes of cases was more economically advantageous to representatives than extending a single case in hopes of a larger payout.

Other than the anecdotal concerns of SSA staff, we could find no definitive evidence from our review of disability program performance data that attorneys were regularly delaying proceedings. This was primarily due to the absence of automated national, regional, and local hearing office data related to representative involvement in disability proceedings. In general, DDS and OHA performance data do not distinguish between individuals who have representation and those who do not. Thus, we were unable to make any

⁴Although the ALJ is expected to consider SSA's interests during the hearing, the nonadversarial process means that SSA is not represented by a government attorney or other advocate.

comparisons between represented cases and unrepresented cases in regard to processing times, frequency of hearings postponements and continuances, disciplinary actions, and similar performance indicators. Management officials noted that if SSA decided such data should be compiled for future use, it would likely require significant reprogramming of current automated systems.

We were also unable to draw any conclusions about representatives' actions from our review of nearly 200 DDS and OHA case files. Through this review, we attempted to manually document the details and day-to-day progress of specific cases to determine whether frequent delays were occurring, the source of any delays, and the amount of fees paid to representatives. We also sought evidence of formal or informal complaints against representatives lodged by DDS or OHA field staff alleging unpreparedness or inappropriate delays. Generally, the case files confirmed that applicants wait a long time for a final decision, especially if the case is appealed to OHA. However, they did not provide us with adequate information to determine whether attorneys were regularly unprepared for hearings. Nor could we determine whether representatives were requesting excessive postponements, submitting medical and other evidence in an untimely manner, or engaging in other delaying tactics. In only a few instances did we identify any notations in the case file in which a DDS examiner or ALJ noted such behavior.

LAWS GOVERNING DISABILITY PROGRAM
MAY CONTRIBUTE TO DECISIONAL DELAYS

Although the data were insufficient for us to determine whether disability representatives were regularly unprepared for hearings, we did identify a common frustration among many SSA personnel regarding disability program laws that, in their view, allow delays to occur. Generally, SSA personnel were concerned about laws that (1) require the disability record to remain open for the submission of new evidence related to the initial impairment or any additional impairment throughout the process; (2) hold SSA accountable for adequately developing the evidentiary record, even when a claimant has representation; and (3) affect ALJs' ability to ensure that representatives adequately represent their clients' interests. A number of staff and managers argued that changes in the law underlying disability program policy were needed to address perceived attorney unpreparedness and delays. However, the representatives we interviewed cautioned that significant changes to the laws governing this program were unnecessary and could place an undue hardship on individuals seeking disability benefits.

- Disability records remain open throughout entire process. Under current law, the disability adjudication process is informal and nonadversarial with multiple opportunities for applicants or their representatives to present

new evidence regarding their client's disability. While the law provides claimants with substantial due process protections, it may also have implications for the program in the form of longer case processing times. During our review, many DDS staff, ALJs, and OHA attorneys responsible for processing disability claims complained about the requirement that the evidentiary record remain open throughout the process and the lack of specific due dates and time frames for presenting evidence. Interviewees commonly noted that this process invited late submissions of evidence by some representatives and requests for unnecessary medical consultations and provided myriad opportunities for representatives to request postponements and continuances.

At both the OHA and DDS levels, interviewees complained that the hearings process allowed some attorneys to delay proceedings. By law, ALJs do not review DDS decisions or rule on their adequacy. Instead, the ALJ or other OHA adjudicator⁵ conducts a de novo review of (or reviews "afresh") the case and may consider any new evidence submitted by a representative that was not heard by DDS examiners. In contrast, appellate courts generally review the findings of lower courts and only consider whether decisionmakers made errors in applying law or procedure. According to those we interviewed, the de novo process not only allows representatives to submit new evidence relevant to the initial impairment but also allows them to claim additional impairments at a later date in hopes of obtaining a favorable ALJ decision. We reported in 1997, that in about 10 percent of the cases appealed to OHA, individuals switch their claimed impairment from a physical impairment to a mental one.⁶ Consideration of newly claimed impairments by ALJs can take a significant amount of time and delay the process further.

— SSA is responsible for ensuring case records are adequately developed.

DDS and SSA staff also complained about another potential source of decisional delay: the law that holds SSA accountable for ensuring that the case record is adequately developed, even if a claimant has a representative. Under the Social Security Act, SSA has primary responsibility for both developing the evidence of disability and issuing the

⁵Not every case involves an ALJ hearing. Under processes recently implemented by SSA, some cases may be awarded by OHA attorneys, paralegals, and other designated personnel without a formal hearing by an ALJ. This process also allows for a de novo review of the evidence by decisionmakers.

⁶Social Security Disability: SSA Must Hold Itself Accountable for Continued Improvement in Decisionmaking (GAO/HEHS-97-102, Aug. 12, 1997).

final decision. Thus, if a representative does not aggressively develop the case record, it is up to SSA to ensure that the necessary medical and vocational evidence is gathered before a decision can be issued. In other executive branch agencies—such as the Department of Veterans Affairs, Federal Communications Commission, and Department of Labor—responsibility for developing evidence is generally left to claimants and their representatives. During our field visits, DDS and OHA personnel commonly complained that this requirement provided little incentive for representatives to develop the case record. Thus, in their opinion, representatives may accept cases knowing that the evidentiary record will be developed for them by OHA if they do not fully develop the record themselves.

- ALJs believe they are limited in their ability to ensure adequate representation. A number of the ALJs we met with believe that judges lack the tools to ensure representatives adequately represent claimants. For example, some ALJs noted that, under current law, they lack contempt authority to hold uncooperative or incompetent representatives responsible for their actions. In the absence of contempt powers, some ALJs told us that they resorted to verbally reprimanding unprepared or uncooperative representatives in front of their clients. This was done in hopes of getting claimants to put additional pressure on representatives to do a better job presenting their case. Most ALJs viewed contempt authority as a necessary and effective tool for penalizing problem representatives.

In suggesting ways to address perceived representative unpreparedness and delays, a number of SSA staff and managers noted that changes in the laws governing disability program policy were needed. They commonly suggested closing the evidentiary record earlier in the process and placing primary accountability for developing the case record with the disability representative, rather than SSA. DDS staff commonly stated that they have too few tools to change the behavior of those representatives who chronically delayed proceedings. Their primary recourse under the current process has been to make a notation in the file or complain to their supervisor, but they said neither action was used frequently or viewed as having any significant impact on representative behavior. The frequent view among those interviewed was that closing the record earlier and requiring representatives to develop the case record would provide a significant incentive for attorneys to play a more active role in the timely development of evidence necessary to decide disability claims.

Such changes would require legislation and potentially difficult changes in fundamental disability program philosophy. During our review, individuals from the representative community conceded that disability representatives may sometimes be the source of delays. However, they cautioned that it would be

unfair to applicants if the record were closed earlier and benefits denied because a representative missed a deadline for submitting evidence. Thus, changes in the laws could potentially result in the loss of benefits to eligible clients.

SSA HAS TOOLS TO ADDRESS PROBLEM REPRESENTATIVES

Our work showed that SSA currently has some tools to influence the behavior of disability representatives and ensure that decisions are reached in a timely manner. First, SSA has statutory authority to review and reduce representative fees if a claimant protests the fee charged. ALJs can also recommend a fee reduction on their own if they believe fees are excessive compared to the level of services provided or if the representative did not adequately represent his or her client's interests. Thus, fee reductions could be used by SSA to penalize those representatives who are regularly unprepared for hearings or delay proceedings. However, few ALJs interviewed said that they actually recommended fee reductions for representatives who, in their opinion, inappropriately delayed proceedings. Many ALJs we interviewed believe that current procedures and requirements for obtaining a fee reduction were administratively burdensome and not worth the additional paperwork SSA requires. Several others believe current policies prevented them from reducing fees once they had approved the initial fee agreement. SSA's policies do allow such actions.

Second, SSA recently developed and implemented new standards of conduct regulations that could be used to penalize representatives who engage in inappropriate delaying tactics or abuse program rules. The standards of conduct became effective in September 1998 and are designed to clarify the obligations of representatives and promote competence, diligence, and timeliness in decisionmaking. They also outline both the duties and the prohibited actions for all representatives in proceedings before SSA. In proposing the standards, SSA stated that there have been sufficient instances of questionable representative conduct to warrant promulgation of new regulations. According to SSA, prior regulations did not adequately address a representative's responsibility to prepare and present a claimant's case. The new standards are designed to better protect claimants and the adjudicative process from representatives who are incapable of providing, or unwilling to provide, meaningful and expeditious assistance in resolving pending claims. They also affirm SSA's authority to suspend or disqualify representatives who engage in abusive behavior, unreasonably delay proceedings without good cause, or charge fees that violate applicable laws or regulations. SSA is currently investigating a number of representatives under these regulations but has not yet taken action against any individuals for misconduct. Until these investigations are completed, it is too early to tell what impact the regulations will ultimately have on SSA's ability to ensure representative preparedness and prevent delays.

AGENCY COMMENTS

We provided a draft of this correspondence to SSA, which agreed that it already has some tools to influence the performance of disability representatives and ensure that decisions are reached more quickly. The agency also noted that the recently revised standards of conduct regulations for representatives could further enhance OHA's ability to successfully penalize those representatives who engage in appropriate delaying tactics or abuse program rules.

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Copies of this correspondence are being sent to the Commissioner of SSA. We will also make copies available to other interested parties. If you or your staff have any question concerning this letter, please contact me at (202) 512-7215 or Rod Miller, Assistant Director, at (202) 512-7246. Daniel Bertoni and Jeff Bernstein also contributed to this report.



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