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Should Congress Create a Special Category of SSA ALJs?

By Jeffrey S. Lubbers*

The growth of the Social Security Administration (SSA) disability adjudication program has been phenomenal. In 1973, the President of the Association of Administrative Law Judges (ALJs) told a Civil Service Commission Advisory Committee that “Administrative Law Judges . . . have experienced a dramatic increase in the number of disability proceedings reaching the hearing level. There were 27,972 proceedings in 1969, 34,901 in 1970, 40,712 in 1971, and by fiscal year 1972 the total had jumped to an unbelievable 56,346.” A July 30, 1974 report of the Civil Service Commission indicated that the SSA employed 430 ALJs at the time, and that the per-judge disposition rate had fluctuated between 114.1 and 143.6 cases per year between 1969 and 1973.

Today those numbers seem miniscule. The SSA Commissioner has testified that he expects the caseload to reach 832,000 in fiscal year 2012 with about 1400 ALJs.¹ One obvious by-product of this huge influx of cases is that the per-judge disposition rate has more than quadrupled from 114 per year in 1969, to 288 per year in 1976, to 594 per year in 2012. There is no end in sight to the rapidly expanding caseload and its attendant backlogs.

Commissioner Michael Astrue has made some progress in reducing the backlogs from their December 2008 highs, and the average processing time for hearing decisions has decreased

to 442 days, down from a high of 514 days at the end of fiscal year 2008, but this was largely because SSA hired 147 ALJs and over 1,000 support staff in FY 2009. Nevertheless, in September 2011, according to a Syracuse University analysis: “The number of disability cases awaiting a hearing and decision by [SSA] continued to climb during the most recent quarter, from July 1 to September 30, 2011. Pending cases rose to 771,318 at the end of this period, up 9.3 percent from 705,367 one year ago.”

Another, perhaps related, problem is that there have been widely reported decisional inconsistencies in the SSA disability adjudication system. As the SSA Inspector General reported in February, among the 1,256 ALJs with 200 or more dispositions in FY 2010, the average decisional allowance rate was about 67 percent, but the 12 ALJs with the highest allowance rates averaged between 96.3 and 99.7 percent, and the 12 ALJs with the lowest allowance rates averaged between 8.55 and 25.1 percent.²

SSA is aware of the inconsistency problem and has commissioned the Administrative Conference of the U.S. (ACUS) to study the fairness, efficiency, and accountability issues raised by these inconsistencies; the study is ongoing and I hope that it will ultimately be useful to SSA and the Congress when it is completed. I am not going to prejudge the ACUS study, but Professor Richard Pierce makes a good point when he points to perverse incentives that make it easier and less of a “hassle” for ALJs to grant cases than to deny them.³ But even so, that does not account for the rather extreme

tails of the bell curve among individual decisionmakers, some of which appear to be based on the location of the hearing office.

Possible New Approaches

In the mid 2000s, SSA attempted some short-lived disability adjudication procedural reforms that I supported.⁴ But, since the reason for abandoning many of them was that the apparently long-term and growing caseload problem makes it impossible to devote enough resources to test them properly, it would seem that the fundamental caseload problem needs to be addressed first.

A number of approaches deserve consideration, including: (1) more rulemaking by SSA to reduce the number of issues that must be heard in individual adjudications; (2) expanding and enhancing video teleconferencing technology; (3) modifying the role of the Appeals Council; (4) introducing government attorneys and adversarial hearings in a limited number of case categories; and (5) considering the establishment of a Social Security Court or tribunal. But one additional possibility is to consider whether SSA ALJs should become a special “breed”—especially since they make up approximately 85% of all ALJs.

Applicability of the Administrative Procedure Act (APA) to SSA Adjudication

An oft-debated threshold issue is whether the formal adjudication provisions of the APA are applicable to SSA disability adjudications. While this is an interesting legal and historical

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¹ Statement of Michael J. Astrue, (July 11, 2011), available at https://www.socialsecurity.gov/legislation/testimony_071111.html.

² See http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-11-01138_0.pdf.

³ Testimony of Professor Richard J. Pierce, available at http://waysandmeans.house.gov/uploadedfiles/pierce_testimony.pdf at 9-10.

⁴ See Frank S. Bloch, Jeffrey S. Lubbers, & Paul R. Verkuil, *The Social Security Administration's New Disability Adjudication Rules: A Significant and Promising Reform*, 92 CORNELL L. REV. 235 (2007).

question, I think it is somewhat beside the point because ultimately the issue of the APA's applicability is up to Congress. I personally think that a close look at the legislative history indicates that, in the 1970s, Congress clearly ratified SSA's long-standing position favoring the use of ALJs in disability adjudication. Whether that might change if SSA changes its position is an open question. But, as a legal matter, the APA certainly would permit such a re-evaluation. APA Section 556, after providing for the use of ALJs in formal adjudications, states: "This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute."

Thus, if Congress became persuaded that circumstances require that the long-standing use of standard-model ALJs in SSA proceedings is no longer tenable, it could "specially provide for or designate" another type of adjudicator, even as it maintains the APA procedures. Congress has done this occasionally. One example was when it allowed SSA to use temporary "SSI judges" for a time in the 1970s. Another example is the special authority given to the Nuclear Regulatory Commission (NRC) to establish three-member atomic safety and licensing boards (ASLBs) using lawyers and scientists.⁵

In the case of the NRC, Congress wished to provide the agency with the flexibility to not only use law-trained judges to hear licensing cases but also scientists. While there might be some basis to open up the SSA adjudicator roster to medical experts, I think the

⁵ See 42 U.S.C. § 2241. There are also numerous non-APA hearing provisions (such as those for immigration cases, public employee disciplinary cases, and government contract appeals) where Congress has specially designated the use of non-ALJ adjudicators. See Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L. J. AM. U. 65, 70-71 (1996) (regarding use of non-APA judges).

it might be appropriate to establish specialized standards for what constitutes the sort of "good cause" that is necessary for SSA to show before the MSPB can discipline or remove a Social Security Judge.

general consensus among commentators is that it is preferable to have legally trained judges in such cases.⁶ However, the well-documented problems with the government-wide ALJ program,⁷ along with the systemic backlogs, might lead Congress to introduce more flexibility into the process of hiring SSA judges in the future. (Of course, any change would almost certainly require the grandfathering of current ALJs.)

Perhaps the biggest frustration for agencies with the ALJ program is the inflexibility in hiring ALJs. While designed as a merit selection program, dissatisfaction with the Office of Personnel Management (OPM) process for assembling the register of eligible applicants, including statutory restrictions on how agencies can hire judges off the register, has led most agencies to hire existing ALJs laterally from other agencies, most often "cherry-picking" from SSA, which employs approximately 85% of the overall ALJ corps. SSA, for its part, has also experienced frustrations in hiring the large number of ALJs it needs.⁸

⁶ See, e.g., ACUS Recommendation 89-10, "Improved Use of Medical Personnel in Social Security Disability Determinations" (Dec 15, 1989), available at <http://www.acus.gov/acus-recommendations/improved-use-of-medical-personnel-in-social-security-disability-determinations>.

⁷ See PAUL R. VERKUIL, DANIEL GIFFORD, CHARLES KOCH, RICHARD PIERCE, & JEFFREY S. LUBBERS, *THE FEDERAL ADMINISTRATIVE JUDICIARY, 1992 REPORTS AND RECOMMENDATIONS OF THE ADMINISTRATIVE CONF. OF THE U.S.* 773 (VOL. 2).

⁸ See the position paper of Ronald Bernoski, President, Ass'n of Administrative Law Judges, "Recommendations on the Social Security Case Backlog" at p. 30 (January 2008) (on file with author) (suggesting that "OPM has shown that it is incapable of providing the American public with the 'best qualified' administrative law judges"). Judge Bernoski's proposed solution is to remove the government-wide ALJ program from OPM and give it to a separate ALJ-run conference. I would prefer a more limited approach that deals specifically with the SSA ALJ corps.

I have supported some government-wide changes to the ALJ selection program, but given the predominance of SSA in the overall program,

I would also support tailoring a special selection process for SSA ALJs. This could be done in two ways—either by a mandate to OPM to provide for specialized hiring of SSA ALJs, or by legislatively designating them as "Social Security Judges" and allowing SSA to fashion its own hiring process that uses the OPM process as a model. This latter suggestion is essentially what has happened with the NRC ASLB members. For example when NRC hires a lawyer member for an ASLB, it posts a notice of an opening and conducts its own OPM-like hiring process.⁹ The two Boards of Contract Appeals also conduct a tailored OPM-like hiring process when they hire their Administrative Judges.¹⁰ Such a process could allow SSA to hire more judges with Social Security experience.

Creating a specially designated category of Social Security Judges would not necessarily require but could allow for consideration of specifically germane attributes for these judges. For example, given the high degree of importance of caseload management in this huge program, Congress could consider departing from the extant prohibition of performance ratings for ALJs. While I know there are legitimate arguments on the other side of this

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⁹ See, e.g., the extensive requirements detailed in this job opening notice for a lawyer panel member: <http://www.usajobs.gov/GetJob/ViewDetails/2284269#>.

¹⁰ See 42 U.S.C. § 7105, (providing that the members of the Armed Services and Civilian Boards of Contract Appeals are to be appointed by DOD and GSA using a process that mirrors the one used for ALJs, except that they must have five years of experience in public contract law). They also have their own statutory salary provision.