

**DISABILITY CLAIMS, REVIEW, HEARINGS AND APPEALS PROCEDURES:
AN ANALYSIS OF ADMINISTRATIVE BEST PRACTICES**

**FINAL REPORT
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Robert F. Rich
Christopher T. Erb
Thomas I. Prudhomme
Peter Blanck

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REVIEW OF THE LITERATURE AND ESTABLISHING A RESEARCH AGENDA FOR THE FUTURE

INTRODUCTION

The Social Security Administration (SSA) has been described as the “Mount Everest of bureaucratic structures” (Dubin, 1993; Huntley, 2002).¹ Since its creation in 1935, SSA’s disability programs have grown in size, complexity and bureaucratic structure. The Mount Everest characterization has been applied because of the complex and intricate system of disability review processes and of adjudicating disability claims in SSA and in the federal courts. The complexity of these administrative-legal processes is confounded by a number of factors, including the very large number of claims filed each year, the difficulty involved in determining someone’s disability status, the role of SSA in the review process, and the role of the federal district courts in the appeals process. The fact that wide variation exists between regions of the country and between demographic categories has also called into question the fairness of the disability determination process.² The “Mount Everest” characterization is problematic because of the goal expressed by Congress since the passage of the Americans with Disabilities Act to provide disability

¹ Jon C. Dubin, *Poverty, Pain, and Precedent: The Fifth Circuit's Social Security Jurisprudence*, 25 St. Mary's L.J. 81, 91 (1993); and see Kelly Huntley *Issues In The Third Circuit: "To Review Or Not To Review?" - That Is The Question: Interpreting New Evidence In Social Security Disability Claims In The Third Circuit* 47 VILL. L. REV. 1089 (2002). (describing the continued bureaucratic development of SSA’s disability programs and the developing disconnect between SSA’s administrative decisions and federal court proceedings on disability program eligibility).

² See Alan Berstein, Disability System’s Fairness Questioned, Houston Chronicle, Nov. 13, 2003, at A1. (reporting on a study commissioned by U.S. Representative Gene Green which showed discrepancies in SSI allowance rates for applicants of different racial and ethnic backgrounds).

benefits “in the most efficient and effective manner” (Huntley, 2002).³

Considerable attention has been focused on the SSA review, hearings, and appeals process by Congress for several reasons: (a) public confidence in the process for determining disability status has been eroded over time because of perceived errors;⁴ (b) this perception had led to serious questions of public credibility, fairness, and efficiency;⁵ (c) the review, hearings, and appeals process does not appear to provide accountability for “errors;”⁶ and (d) the program has not met its goals of helping disability beneficiaries to return to work.⁷ It can take up to two years for a disability benefits applicant to pursue an appeal through the administrative processes within SSA and, potentially, the federal courts.⁸ Disability Determination Services (DDS Adjudicators) are responsible for making initial assessments of claimants’ eligibility and for reviewing an unsuccessful claimant’s

³ Huntley, Kelly *Issues In The Third Circuit: "To Review Or Not To Review?" - That Is The Question: Interpreting New Evidence In Social Security Disability Claims In The Third Circuit* 47 VILL. L. REV. 1089 (2002).

⁴ GAO, November 2003. *SSA Disability Decision Making: Additional Steps Needed to Ensure Accuracy and Fairness of Decisions at the Hearings Level*. GAO-04-14.

⁵ GAO, September 2002. *SSA Disability Decision Making: Additional Measures Would Enhance Agency’s Ability to Determine Whether Racial Bias Exists*. GAO-02-831.

⁶ GAO, January 2003. *Major Management Challenges and Program Risks: Social Security Administration*, General Accounting Office Performance and Accountability Series, GAO-03-117.

⁷ GAO, March 1997. *Social Security: Disability Programs Lag in Promoting Return to Work*. GAO/HEHS-97-46; GAO, April 1996. *SSA Disability: Program Redesign Necessary to Encourage Return to Work*. GAO/HEHS-96-62; and see Edward H. Yelin (1994) *Making Work more Central to Work Disability Policy*, the Milbank Quarterly, 72(4), 593-619. see also Bonnie O’Day, *Policy Barriers for People with Disabilities who want to work*, American Rehabilitation Spring/Summer, 1999, available at http://www.findarticles.com/p/articles/mi_m0842/is_1_25/ai_57745546/print (last visited Sept. 12, 2005).

⁸ Although SSA has had some success with improving processing times for disability claims, decreasing the average time to 251 days in 2004 from 505 days in 2000. See SSA’s Performance and Accountability Report for Fiscal Year (FY) 2004, [Individual Performance Measure Results and Outcome Indicators](http://www.ssa.gov/finance/2004/Individual_Results.pdf), available at http://www.ssa.gov/finance/2004/Individual_Results.pdf (last visited Sept. 14, 2005).

first appeal. Should a claimant appeal a second unfavorable decision, an Administrative Law Judge (ALJ) becomes involved in the case. The ALJ may seek additional information about the case or may rely on information already in the claimant's file.

On September 25, 2003, the Commissioner of the Social Security Administration, the Honorable JoAnne B. Barnhart, testified before the House Committee on Ways and Means, Social Security Subcommittee Hearing on the Social Security Administration's Management of the Office of Hearings and Appeals.⁹ In her report, the Commissioner identified seven areas of particular interest to SSA in the process of reforming the administrative process of SSA disability determinations. These areas included: 1) increasing resources to eliminate the backlog and reduce the lengthy processing time; 2) improving the quality of the administrative record; 3) applying SSA policy consistently across regions, offices, and administrative levels; 4) maintaining the de novo ALJ hearing procedure; 5) timely case retrieval, transcription, and transmission; 6) early screening and analysis of cases where the applicant is obviously disabled; and 7) removal of barriers to return to work.¹⁰

Also in that report, the Commissioner laid out her primary goal of providing timely and accurate service, which is to be achieved by improving the workload management as well as improving the disability determination process itself. Her short-term strategy is to focus on immediately actionable aspects of the process while her long-term strategy is

⁹ House Ways and Means Committee, Subcommittee on Social Security, Thursday, September 25, 2003. *SSA Commissioner Barnhart's Testimony, Hearing on the Social Security Administration's Management of the Office of Hearings and Appeals*. Available at: <http://waysandmeans.house.gov/hearings.asp?formmode=detail&hearing=106&comm=4> (last visited Sept. 22, 2005).

¹⁰ Barnhart Testimony (Sept. 25, 2003), at 1.

designed to improve the overall process.¹¹

One of the fundamental goals of the Social Security Administration in its “service to the public” has always been to provide fair, accurate and timely service to its beneficiaries, and in its reform efforts the Administration has attempted to remain true to this mission (SSAB, Sept 1999).¹² However, the fundamental challenge in the disability review process is to make determinations consistent and create accountability for those decisions without prematurely foreclosing the opportunity for a potential beneficiary to provide evidence of his or her disability for review. The goal is not to make it more difficult for potential beneficiaries to “prove” their eligibility; rather it is to make decisions based on the evidence more fair, accurate, and timely. Thus the challenge is how to create a disability determination system that is timely, easy to use, consistent and uniform without sacrificing the protections for adults and children with disabilities that have been put in place and are enforced by the federal courts (Erkulwater, 2001-2002).¹³

We have conducted a critical review of a wide variety of published material, ranging from scholarly literature in economics, law, and public policy to agency reports to commissioned independent studies. In doing so, we point to gaps in the literature and we

¹¹ Barnhart Testimony (Sept. 25, 2003), at 1, 2.

¹² SSAB, September 1999. *How the Social Security Administration Can Improve its Service to the Public*. Available at <http://www.ssab.gov>; This goal was explicitly reiterated in recent testimony by GAO, *SSA Customer Service: Broad Service Delivery Plan Needed to Address Future Challenges*: “Because of its broad reach, the quality of its customer service can affect the public’s view of government overall, and SSA has committed itself to providing world-class service to the American public” (GAO/T-HEHS/AIMD-00-75, p 1., Feb. 10 2000)

¹³ Erkulwater, Jennifer L. *The Judicial Transformation of Social Security Disability: The Case of Mental Disorders and Childhood Disability* 8 CONN. INS. L.J. 401 (2001-2002).

formulate a research agenda for the future. Commissioner Barnhart's September 2003 comments echo in many ways concerns and recommendations that have been made over time. The evolution of the discourse on the SSA disability determination process is examined beginning with early reports and analyses from the 1970s and 1980s and culminating with a review of materials (articles and reports) published in early 2005. This review of the literature covers issues arising throughout the disability determination (DD) process, from an applicant's initial decision to apply for benefits, to issues that arise during the DD process, including the hearings and review stages, to factors that affect current beneficiaries' eligibility to remain on SSA disability rolls, to what becomes of those who leave the programs.

This report is organized into four parts. In the first part, we characterize the literature dealing with the Social Security Administration's disability programs, and describe the sample we drew from for this report. In part two, we review evidence from the literature for the need for reform of the Disability Determination process, and we outline some of the solutions that have been proposed. In doing so, we identify workforce issues such as staffing and training and stakeholder buy-in as one of the major determinants of reform success. We also find improving the data collection, organization, and retrieval capabilities to be of fundamental importance to future reform efforts at SSA. In part three, we outline a research agenda that would help address both the future data needs of the agency and the stakeholder buy-in issues that may have contributed to problems with previous reform efforts. In part four we offer a proposed research agenda.

I. THE LITERATURE ON SOCIAL SECURITY DISABILITY PROGRAMS

This review focuses on legal and administrative issues in SSA disability programs, and on economic issues surrounding these programs.¹⁴ The data for this report include some 150 articles, reports, commissioned studies, and congressional testimonies published between 1979 and 2005. We have included several reports from the U.S. General Accounting Office (GAO) series on SSA’s disability programs (15 reports), Social Security Advisory Board publications (3), Social Security Administration’s internal reports (9), and agency testimony before various Congressional committees (7). We have also reviewed 40 law review articles, and 30 articles from the public economics literature. In addition, another 30 articles and books have been consulted from various other disciplines, including medicine, public affairs, health services research, and disability policy. This group of articles and reports was drawn from a much larger body of literature, which includes over 200 GAO reports on federal disability programs, more than 70 SSA publications, 24 SSAB reports, over 50 articles and working papers from the National Bureau for Economic Research (NBER) and other economics journals, and more than 100 law review articles. The final selection of material to include in this review was based on relevance to the main themes of our study.

The GAO reports generally are of two types: data reports on issues such as administrative backlog and other programmatic challenges; and assessments of reform initiatives, such as the Hearings Process Improvement Plan (HPI). They have been an important source of historical data, as they chronicle various reform initiatives over the

¹⁴ We do not address disability policy and law more generally, and this review does not include the vast literature interpreting the Americans with Disabilities Act, related laws, and issues having to do with the civil and human rights of people with disabilities. Furthermore, there is little discussion of assistive technology and virtually none about “disability culture”, which has its own robust literature.

past twenty years.

The legal literature has focused more on administrative issues, including standards of review and appropriate levels of discretion by ALJs and others charged with adjudicating disability claims. This literature delves more deeply into some of the issues identified in GAO and SSA reports, and it helps frame the recommendations we offer for further research to support SSA’s reform goals.

II. THE DISABILITY DETERMINATION PROCESS: THE NEED FOR REFORM AND STRATEGIES TO ACHIEVE IT

Two broad categories of “reform” that have been considered most important for SSA’s disability programs: administrative efficiency (as judged by the number of pending cases and associated backlog) and economic efficiency (as judged by the “appropriateness”¹⁵ of expenditures).¹⁶

The Social Security Disability Determination process has been scrutinized from both of these perspectives: the beneficiary’s desire to have a fair, accurate and timely review; and the administrative necessity to create an efficient, responsive and responsible system. The SSA pays more than \$1.425 billion dollars per week in cash disability benefits

¹⁵ In using the term “appropriateness” we are referring to the dual issue of over- and under-payment of benefits, which is related to eligibility criteria as well as the accuracy of the DD process and the continuing disability review process (CDR).

¹⁶ Economic inefficiency could be the result of the DD process or other aspects of the program, such as return-to-work initiatives. Clearly, these two categories are related – an inaccurate disability determination can lead to inappropriate expenditure – but identification of the step of the process at which the inefficiency arose is critical to designing a reform strategy that will resolve the problem.

(GAO) Jan 2004).¹⁷ Given the magnitude of the SSA disability program, small increases in efficiency and accuracy could have significant effects on overall expenditures by the agency. For example, in 1998 although only 21% of SSA beneficiaries qualified because of disability, they accounted for about two-thirds of total administrative expenditures, or about \$4.3 billion (GAO Oct 21, 1999).¹⁸

Commissioner Barnhart outlined a set of recommendations for reform of the DD process. This was not the first such attempt in the history of the Social Security Administration¹⁹ (SSA 1989; SSAB 1998; SSA 1999; SSA 2000; SSAB 2001, GAO Jan. 2003), and many studies have set out to identify areas where administrative efficiencies might be realized²⁰ (SSAB Aug 1998; GAO, Oct. 1999; GAO Feb. 2002; Verkuil & Lubbers, March 2002; GAO, June 2002).

Illustrative of the ongoing nature of the SSA reform process is a 1999 report by the then Director of Education, Workforce, and Income Security Issues, Cynthia M. Fagnoni,

¹⁷ GAO, January 2004. *Social Security Administration: Strategic Workforce Planning Needed to Address Human Capital Challenges Facing the Disability Determination Services*. GAO-04-121.

¹⁸ GAO, October 21, 1999. *Social Security Disability: SSA Has Had Mixed Success in Efforts to Improve Caseload Management*. GAO/T-HEHS-00-22.

¹⁹ House Ways and Means Committee, Subcommittee on Social Security, Thursday, September 25, 2003. **SSA Commissioner Barnhart's Testimony, Hearing on the Social Security Administration's Management of the Office of Hearings and Appeals**. Actual recommendations appear in the Federal Register, 70FR43590-43624, July 27, 2005.

²⁰ Social Security Advisory Board, Aug 1998, *How SSA's Disability Programs Can Be Improved*, available at: <http://www.ssab.gov/Publications/Disability/report6.pdf> (last visited Sept. 26, 2005); GAO, October 21, 1999. *Social Security Disability: SSA Has Had Mixed Success in Efforts to Improve Caseload Management*. GAO/T-HEHS-00-22.; GAO, February 2002. *Social Security Disability: Disappointing Results From SSA's Efforts to Improve the Disability Claims Process Warrant Immediate Attention*. GAO-02-322.; SSA, March 1, 2002. *Alternative Approaches to Judicial Review of Social Security Disability Cases: A Report to the Social Security Advisory Board*. Paul Verkuil & Jeffrey Lubbers. Contract no. SSA-RFG-02-0026.; GAO, June 11, 2002. *Social Security Disability: Efforts to Improve Claims Process Have Fallen Short and Further Action is Needed*. GAO-02-826T.

which suggests a very similar set of problems as was reported by SSA commissioner Barnhart in her 2003 testimony:

“The process of applying for benefits is complex and can confuse or frustrate the applicants. Also, SSA has a backlog of applications and appealed cases, and people often have to wait as long as a year for a final decision on their eligibility. Moreover, there are concerns about the fairness of the decisions-making process because of the high percentage of applicants who are initially denied benefits and then, upon appeal, are approved. Finally, once people begin receiving benefits, SSA’s reviews to determine whether these beneficiaries continue to be eligible have been inadequate (GAO, Oct. 1999, p. 1).”²¹

The novelty of Commissioner Barnhart’s recommendations for change is evident when considering the process as it exists today. Currently, an individual making a claim for a physical or mental disability can apply for Social Security Disability Insurance (SSDI) under Title II of the Social Security Act or for Supplemental Security Income (SSI) under Title XVI of the Act (SSA Pub. No. 64-039, 2003).²² The Disability Determination Process is outlined as follows:

1. *Initial Application* – in this stage applicants must “prove” that they are eligible for benefits and that they have met all requirements for benefits; it is in this stage that evidence is accumulated that will form the basis for a claim. This stage leads to a determination of “allowance” or “denial.” This decision hinges primarily on the evidence provided by the claimant that he is disabled and unable to work. There were 2,574,848 initial applications processed in 2004.²³

²¹ GAO, October 21, 1999. *Social Security Disability: SSA Has Had Mixed Success in Efforts to Improve Caseload Management*. GAO/T-HEHS-00-22., p. 1

²² SSA Pub. No. 64-039, 2003

²³ SSA’s FY 2004 Performance and Accountability Report, at 45 available at <http://www.ssa.gov/finance/2004/PerfGoals.pdf> (last visited Sept. 14, 2005). Approximately 40 percent of disability claims are approved at this initial step, and approximately 25 percent move on to the reconsideration stage. See Social Security Disability Programs, Flow of Cases Through the Disability Process, available at http://www.ssa.gov/disability/disability_process_welcome.htm (last visited Sept. 14, 2005). HYPERLINK "http://www.ssa.gov/disability/disability_process_welcome.htm last visited Sept. 14,

²³ Ibid at 46. While the average processing time for initial disability claims is improving (97 days in 2004 compared to 104 days in 200" ²³

2. *Reconsideration* – this phase is conducted by DDS officials and allows for the accumulation of additional medical and vocational evidence. The SSA must consider the entire vocational profile of the claimant. This includes the claimant’s functional abilities, age, education, and prior work experience. Approximately 25 percent of initial applications are reconsidered at this stage, and about 16 percent of these result in successful outcomes for the applicant.
3. *Hearing* – this phase is conducted by an ALJ and is designed as a “non-adversarial process” in which the ALJ is obligated to protect the applicant’s rights, preserve the integrity of the program, and make an impartial decision. There were 497,379 hearings processed in 2004.²⁴
4. *Appeal* (through the “Appeals Council”) – this is the last step of the administrative review and it is at this stage that an ALJ’s decision may be reviewed based on the written record and the transcript from the hearing. Only five percent of cases reach this stage, and only one in four appeals is successful at this stage.
5. *Appeal* (through the Federal Courts) – this is the final stage of appeal and no longer constitutes an administrative review within the SSA, as it occurs outside of SSA’s jurisdiction. Less than one percent of cases reach this level of appeal.

A. Summary of Issues in the DD Process

The Disability Determination process is clearly very complicated and has a high volume of operation.

At the “Initial Application” stage, for example, it has been difficult to interpret the statutory language (Diller, 1998).²⁵ This creates questions about the nature of the evidence that DDS adjudicators use in making their decisions, and may contribute to the fact that

²⁴ Ibid at 46. While the average processing time for initial disability claims is improving (97 days in 2004 compared to 104 days in 2002, the processing time for hearings is growing longer (377 days in 2004 compared to 336 days in 2002), Approximately 63 percent of hearings lead to favorable decisions for the applicant.

²⁵ Diller, Matthew (1998). *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs* 76 TEX. L. REV. 1003

many cases are reversed on appeal.

During the “Reconsideration” stage, in evaluating prior work experience, the SSA must, under the regulations, determine whether or not the claimant acquired work skills that could be used in other jobs “transferable skills” (Dolan, 2000).²⁶ At this stage, new evidence may be introduced which raises issues about the quality and completeness of the original case file.

At the “Hearing” stage similar issues arise. The process of agency adjudication is currently structured so as to assure that the hearing examiner exercises independent judgment on the basis of the evidence before him, free from pressures by the parties or other officials within the agency (Wolfe, 2002).²⁷ One of the major issues in the current hearing procedures is “due process” for the claimant (Drapkin, 2000).²⁸ More specifically, the courts have found that “due process” requires that notice of termination of benefits must detail the reasons for the proposed termination so that the recipient can determine whether the underlying factual information is correct (Vaughan, 1999).²⁹ There has also been tension present in this process when the SSA has used an agency “peer reviewer” to examine the case which is then followed by the ALJ. Tension or potential conflict arises when the peer reviewer and the ALJ differ in their views in three significant ways: (a) the

²⁶ Dolan, Catherine J. (2000). *Kildow v. Baldwin Piano & Organ - The Tide Has Turned for Legitimate Carpal Tunnel Syndrome Claims in Arkansas Workers' Compensation Law* 53 ARK. L. REV. 439

²⁷ Wolfe, Jeffrey Scott *Are You Willing To Make The Commitment In Writing? The APA, ALJs, And SSA* 55 OKLA. L. REV. 203 (2002).

²⁸ Drapkin, Robert T. (2000). *Protecting The Rights Of The Mentally Disabled In Administrative Proceedings* 39 CATHOLIC LAW. 317

²⁹ Vaughan, Daniel T. *Ford v. Shalala Applying Mathews v. Eldridge to SSI Benefits* 19 J. NAALJ 145 (1999).

materiality of certain facts and policies; (b) the interpretation of agency policy; and (c) retroactive application of new agency policy (Gales, 2001).³⁰

At the “Appeal” stage there has also been tension regarding the proper balance of independence and accountability of ALJs in making disability determinations (Rosenblum, 1998)³¹, and the peer review process for ALJ decisions has at times been controversial (Gales, 2001).³² It is worth noting that the exact role of the Appeals Council during the administrative review process and the district court during the judicial review process are highly litigated topics and are regularly on the agenda for “reform” of SSA procedures (Huntley, 2002).³³

These factors all combine to create concerns about the length of time involved in processing disability claims,³⁴ the rate of appeal and reversal of SSA eligibility decisions, and DDS and ALJ accountability for “errors” in this process. These problems may be related to the fact that there are significant differences from state to state in methods for administering the SSDI and SSI programs which have led to wide variations in “allowance rates” for recipients (Verkuil, 2002).³⁵

³⁰ Gales, Robert Robinson *The Peer Review Process In Administrative Adjudication* 21 J. NAALJ 56 (2001).

³¹ Rosenblum, Victor G. *Toward Heightening Impartiality In Social Security Agency Proceedings Involving Administrative Law Judges* 18 J. NAALJ 58 (1998).

³² Gales, Robert Robinson *The Peer Review Process In Administrative Adjudication* 21 J. NAALJ 56 (2001).

³³ Huntley, Kelly Issues *In The Third Circuit: "To Review Or Not To Review?" - That Is The Question: Interpreting New Evidence In Social Security Disability Claims In The Third Circuit* 47 VILL. L. REV. 1089 (2002).

³⁴ SSA Strategic Plan 2003-2008, SSA Pub. 01-001, March 2003, at 14. available at www.ssa.gov

³⁵ Verkuil, Paul R. *An Outcomes Analysis of Scope of Review Standards* 44 WM AND MARY L. REV. 679 (2002).

Concern has also been raised that the DD process is comprised of a set of administrative processes which do not lead to the development of complete and accurate files early in the process. As a result, ALJs often do not have access to a complete client file and may lack crucial data that would make their determination more accurate, fair, and efficient. In some cases, a case may be drawn out in time while the ALJ waits for important client information to be gathered. This concern is related to the quality of the written record. What evidence is “sufficient” for making a benefit determination? What evidence is currently being considered? To what extent is sufficient “evidence” included with the decisions that are ultimately reached in approving or denying a claim? Are decisions and the evidence they are based on adequately documented at each stage of the process?

Many people with disabilities do not understand what evidence is required to establish their eligibility for benefits. Moreover, applicants frequently do not understand that it is their responsibility to prove that their impairments prevent them from working. This, coupled with the fact that discrepancies exist in the ways ALJs seek and use information, and in the very information upon which they base their decisions, has created the desire within the SSA and among its employees, beneficiaries, and the public to improve the system.

Finally, although the SSDI, SSI and other disability programs, such as that of the Veterans Administration, have evolved over time, there is concern that they have not kept abreast with progress in areas of medical and vocational technologies or with changing attitudes about disability (Blanck, 2005; U. Pittsburgh Law Review).³⁶ The programs have

³⁶ Peter Blanck, 2005, *First Thornburgh Family Lecture on Disability Law and Policy: Americans*

repeatedly been described as being “out-of-step with medical and technological advances and changes in the workforce and the economy” (GAO August 2002, 02-597, Re-Examination of Disability Criteria; GAO January 2003).³⁷

The Social Security Advisory Board raised the following set of questions in its 2001 report *Charting the Future of Social Security’s Disability Programs: The Need for Fundamental Change*:

“Are disability decisions consistent and fair?”; “Is disability policy being developed coherently and in accord with the intent of the Congress?”; “Can today’s administrative structure support future program needs?”; and “Is Social Security’s definition of disability appropriately aligned with national disability policy?” (SSAB January 2001, p. 3, 5, 6, 9).³⁸

A January 2003 GAO report (GAO Jan 2003).³⁹ cautioned that without improved methods for determining eligibility, including updated definitions that take account of employment capabilities in the information age, SSA will continue to experience backlogs of cases and will fall short of its goal of returning people to work. This, of course, relates back to both reform criteria described above – administrative and economic efficiency. Given that there are roughly two million applicants to the SSA disability programs annually, and the \$1.5 billion in cash benefits delivered each week, the importance of the

with Disabilities and their Civil Rights: Past, Present, and Future, 66 U. Pittsburgh Law Review XX, (2005).

³⁷ GAO, August 2002. *SSA and VA Disability Programs: Re-Examination of Disability Criteria Needed to Help Ensure Program Integrity*. GAO-02-597.; GAO, January 2003. *Major Management Challenges and Program Risks: Social Security Administration*, General Accounting Office Performance and Accountability Series, GAO-03-117.

³⁸ SSAB, January 2001. *Charting the Future of Social Security’s Disability Programs: The Need for Fundamental Change*. Available at <http://www.ssab.gov> , p. 3, 5, 6, 9

³⁹ GAO, January 2003. *Major Management Challenges and Program Risks: Social Security Administration*, General Accounting Office Performance and Accountability Series, GAO-03-117.

current attempts to reform the SSA disability determination (DD) process are clear (Duddlestone et al., Oct. 2002; SSAB Jan 2001).⁴⁰

The previous summary of issues arising during the disability determination process reveals a few recurring themes which should be explored in more detail: 1) The non-evolving definition of disability SSA uses in its DD process; 2) Variation between and within the Office of Hearings and Appeals (OHA) regional offices in terms of consistency of eligibility decisions; 3) Insufficient human capital in terms of recruiting, training and creating accountability for DDS Adjudicators, ALJs and others involved in the DD process; and 4) Inefficiencies in the disability review process itself. In the following section, we present the major empirical findings related to these categories and then analysis of the primary solutions to the problems offered in the literature.

B. Defining Disability

The definition of disability is critical because it is used to set eligibility criteria for public programs and provide protection under the law. Participation in the Social Security Disability Insurance Program (SSDI), increased by 160 percent between the mid-1980s and late-1990s, from 4.4 million to over 7 million enrollees.⁴¹ During that time period there

⁴⁰ Duddlestone, David N., Joseph W. Blackston, Marshall J. Bouldin, and C. Andrew Brown (October 2002). *Disability Examinations: A Look at the Social Security Disability Income System*. The American Journal of Medical Sciences, 324(4); 220-226.; SSAB, January 2001. *Charting the Future of Social Security's Disability Programs: The Need for Fundamental Change*. Available at <http://www.ssab.gov>

⁴¹ Mitch LaPlante, Jae Kennedy, and Laura Trupin. Income and Program Participation of People with Work Disabilities. *Disability Statistics Report, (9)*. Washington, DC: U.S. Department of Education, National Institute on Disability and Rehabilitation Research (1997).

has also been an absolute increase in the number of people with disabilities in the United States, and the increase in SSDI enrollment at least partially reflects this overall increase.

Because different disability programs have different goals and target beneficiary groups, a variety of definitions of disability have arisen in the context of specific disability programs. Disability is defined broadly under the Americans with Disabilities Act (ADA) as a substantial limitation in a major life activity (see Blanck et al., 2003 West Treatise).⁴² This is a broad definition that leaves room for interpretation, but the definition becomes more precise in programs with specific goals. For example, because the Social Security Administration (SSA) operates a cash benefit program for people whose disability prevents them from working, it requires that potential beneficiaries have a “severe” disability⁴³:

“The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. To meet this definition, you must have a severe impairment, which makes you unable to do your previous work or any other substantial gainful activity which exists in the national economy. To determine whether you are able to do any other work, we consider your residual functional capacity and your age, education, and work experience”⁴⁴.

In addition to requiring that a potential beneficiary meet the severe disability criteria, the definition of disability used by SSA stipulates that "the individual must be unable to engage in minimal levels of work because of a medically determinable physical

⁴² PETER BLANCK, EVE HILL, CHARLES D. SIEGAL, & MICHAEL WATERSTONE, *DISABILITY CIVIL RIGHTS LAW AND POLICY*. West, 2004 at 3-3.

⁴³ 20 CFR 404.1520(c) Evaluation of disability in general.

⁴⁴ 20 CFR 416.905 Basic definition of disability for adults.

or mental impairment that is expected to last for at least 12 months or result in death."⁴⁵ This definition is limited to a person's ability to function in the workplace, and does not necessarily take into account a person's abilities or limitations in other areas of daily life.

Although the definition of disability used by SSA has been developed since the program was introduced in 1954,⁴⁶ the work-related impairment has always been the focus. In 1967, changes were made with regard to what it means to be unable to do significant gainful activity (SGA), adding the requirements that the person's age, education and work experience be considered and that the person be unable to do work available in the national economy.⁴⁷ Employment opportunities and the nature of work itself have evolved dramatically since those changes were made, making evaluation of available employment opportunities more difficult.⁴⁸ Utilizing updated medical diagnostic and treatment evidence, as well as changing employment opportunities, is essential for enhancing the overall application process.

Unclear definitions, or incomplete medical records, can lead to "classification" or "tagging" errors that inappropriately label applicants as ineligible for SSA benefits

⁴⁵ 20 C.F.R. § 416.905 (2002); for further explanation of eligibility requirements for Social Security benefits, see The Social Security Administration. *Social Security Disability Planner*. Available at: <http://www.ssa.gov/dibplan/dqualify4.htm> (last visited Sept. 22, 2005).

⁴⁶ See *The Development of the Disability Program under Old Age Survivors Insurance, 1935-74*, at <http://www.ssa.gov/history/pdf/dibreport.pdf> for an overview of the early history of federal disability programs and their development until 1974.

⁴⁷ Social Security Amendments of 1967 (Pub. Law 90-248). See *id.*, p. 116-118.

⁴⁸ See Edward H. Yelin, *The Impact of Labor Market Trends on the Employment of People with Disabilities*, American Rehabilitation, Spring/Summer 2001, available at http://www.findarticles.com/p/articles/mi_m0842/is_1_26/ai_82062789/print (last visited Sept. 12, 2005); and see IOM, July 2002. *The Dynamics of Disability: Measuring and Monitoring Disability for Social Security Programs*. Institute of Medicine, available at <http://books.nap.edu/catalog/10411.html> (last visited Sept. 26, 2005), summary p. 10.

(Benitez-Silva et al 2004; Parsons 1996; Boadway et al 1999).⁴⁹ These classification errors may create problems for the programs in terms of monitoring disability over time if they systematically exclude applicants with certain types of disabilities (IOM 2002).⁵⁰ The Institute of Medicine report, *The Dynamics of Disability*, highlighted the large amount of variability over time, between states, between DDS evaluators, between DDSs and ALJs, as a result of legislative changes and court decisions, and with regard to the adequacy of resources to process and review claims, and it suggested that this variation may lead to inappropriate allowance decisions in both directions. Initial and ongoing classification errors appear to be a general problem, and, as a matter of programmatic efficiency, the potential for inappropriate allowances should not be ignored. Because SSA applicants rarely leave the disability rolls once qualified, inappropriate allowances at the initial stage are exceedingly difficult to rectify, even with the continuing disability review (CDR) process (IOM 2002).⁵¹

⁴⁹ Benitez-Silva, Hugo, Moshe Buchinsky, and John Rust (January 2004). *How Large are the Classification Errors in the Social Security Disability Award Process?* NBER working paper no. 10219; available at <http://www.nber.org/papers/w10219>; Parsons, Donald O. (1996). *Imperfect 'Tagging' in Social Insurance Programs*. Journal of Public Economics, 62, 183-207; Boadway, Robin, Nicolas Marceau, and Motohiro Sato (1999). *Agency and the Design of Welfare Systems*. Journal of Public Economics, 73; 1-30.

⁵⁰ IOM, July 2002. *The Dynamics of Disability: Measuring and Monitoring Disability for Social Security Programs*. Institute of Medicine, available at <http://books.nap.edu/catalog/10411.html> (last visited Sept. 26, 2005).

⁵¹ (IOM 2002); the CDR process is conducted periodically on individual beneficiaries' files to determine whether they continue to be eligible for benefits based on their medical condition. In 2004, 1,604,680 CDRs were processed, which was up from 1,371,255 in 2003. See <http://www.ssa.gov/finance/2004/PerfGoals.pdf> at 56. While inappropriate allowances do not appear to be a significant problem for SSA, the fact that the CDR process clearly provides that the medical improvement standard does not apply where there was fraud involved in securing the earlier determination of disability suggests that this is a concern. HYPERLINK "http://www.ssa.gov/finance/2004/PerfGoals.pdf at 56.

⁵¹ Benitez-Silva, Hugo, Moshe Buchinsky, Hiu Man Chan, Sofia Cheidvasser, and John Rust (February 2000). *H*"

Several suggestions have been made. For example, Hugo Benitez-Silva and colleagues have suggested that applicants' self-descriptions of disability are sufficiently accurate to allow them to guide the decision process (Benitez-Silva et al 2000).⁵² Others have suggested that applicants' personal physicians provide a complete medical record (Murchison, 2001-2002; Duddleston et al 2002).⁵³ Some have suggested that an independent medical review be provided (Rosenblum, 1999) or that⁵⁴ other health professionals be involved in the disability determination (Boadway et al 1999).⁵⁵ The suggestion has also been made that some sort of claims manager help complete the disability file (SSA June 2001)⁵⁶ or that some decisional protocol be developed that would help standardize the evidence that is requested and used in the decision (IOM 2003)?⁵⁷

Another dilemma posed for the DD process is the emergence of “new” forms of disability that may not have been adequately addressed by existing standards of review or

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Benitez-Silva, Hugo, Moshe Buchinsky, Hiu Man Chan, Sofia Cheidvasser, and John Rust (February 2000). *How Large is the Bias in Self-Reported Disability?* NBER working paper no. 7526; available at <http://www.nber.org/papers/w7526>; (last visited Sept. 26, 2005).

⁵³ Murchison, Brian C. *Treating Physicians as Expert Witnesses in Compensation Systems: The Public Health Connection* 90 KY. L.J. 891 (2001-2002); Duddleston, David N., Joseph W. Blackston, Marshall J. Bouldin, and C. Andrew Brown (October 2002). *Disability Examinations: A Look at the Social Security Disability Income System*. The American Journal of Medical Sciences, 324(4); 220-226.

⁵⁴ Rosenblum, Victor G. *The Right To Cross-Examine Physicians In Social Security Disability Cases* 26 FLA. ST. U.L. REV. 1049 (1999).

⁵⁵ Boadway, Robin, Nicolas Marceau, and Motohiro Sato (1999). *Agency and the Design of Welfare Systems*. Journal of Public Economics, 73; 1-30.

⁵⁶ SSA, June 2001. *Assessment of the Hearings Process Improvement Plan Phase 1*. SSA Pub. A-06-00-20051. Office of the Inspector General.

⁵⁷ IOM, July 2003. *Key Capabilities of an Electronic Health Record System: Letter Report* (to the Director of the Agency for Healthcare Research and Quality), Institute of Medicine, Committee on Data Standards for Patient Safety, Board on Health Care Services. Available at <http://www.nap.edu>

for which there are no judicial or administrative precedents.⁵⁸ Examples include, people living with HIV disease, certain forms of mental illness, and those with chronic but treatable disorders may require a different standard of review by ALJs (Feldblum, 2000; Otwell, 2000; Lezuch, 1999).⁵⁹

C. Variation

The importance of examining the variation within the Disability Determination process was articulated in the October 21, 1999 GAO report, *Social Security Disability: SSA Has Had Mixed Success in Efforts to Improve Caseload Management*:

“SSA has determined that, at the initial level, denial cases are more error-prone than are allowance cases, while at the hearing level, allowance cases are more error-prone. This inconsistency has been attributed to a number of factors. According to SSA, and administrative law judge (ALJ) might arrive at a different decision than a DDS because the claimants’ condition has worsened, or because ALJs are more likely than DDS decision-makers to meet with claimant face-to-face, and thus have access to more or different information. However, SSA studies have also found that DDS and ALJ adjudicators often arrive at a

⁵⁸ Chronic but treatable medical conditions are a prime example because they challenge the requirement that an individual must be seriously disabled to qualify for benefits. This issue became salient in the “Sutton Trilogy” Supreme Court decisions, which dealt with the issue of whether individuals with treatable medical conditions could be qualified as disabled under the Americans with Disabilities Act (ADA). For more on the “Sutton Trilogy” see Robert F. Rich, Christopher T. Erb, & Rebecca A. Rich, *Critical Legal and Policy Issues for People with Disabilities*, 6 DePaul Journal of Health Care Law 1-54, at 24-25, discussing the three cases that made up the trilogy: *Sutton, et. al. v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); and *Murphy v. United Parcel Service, Inc.* 527 U.S. 516 (1999).

⁵⁹ Feldblum, Chai R. *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?* 21 BERKELEY J. EMP. & LAB. L. 91 (2000); Otwell, Sarah N. *Re-Defining Disability: Legal Protections For Individuals With HIV, Genetic Predispositions To Disease, Or Asymptomatic Diseases: Note: Cleveland V. Policy Management Systems Corporation: Triumph For The Working Disabled Or Hollow Procedural Device?* 3 J. HEALTH CARE L. & POL’Y 452 (2000); Lezuch, Carolee Kvorciak *The Americans With Disabilities Act: Redefining "Major Life Activity" To Protect The Mentally Disabled* 44 WAYNE L. REV. 1839 (1999).

different conclusion even when presented with the same evidence. This is due, in part, to the fact that DDS and ALJ adjudicators use different approaches in evaluating claims and making decisions. This inconsistency of decisions has raised questions about the fairness, integrity, and cost of SSA's disability program." (GAO Oct. 21 1999 GAO/T-HEHS-00-22).⁶⁰

The 1999 GAO report, however, was not the first time that variation in DD decisions among and within states was identified,⁶¹ and the persistence of such variation remains a critical area for SSA reform. The sentiment of the GAO report was echoed in a call for reform issued three years later by the Institute of Medicine in its commissioned report, the *Dynamics of Disability*:

"Significant differences are observed in allowance rates across states, between Disability Determination Service (DDS) decision makers, and between DDS Adjudicators and administrative law judges. The allowance rate is also influenced by legislative changes as well as court decisions, and the adequacy of resources to process and review cases. ***Increased research is needed to explain these variations and whether they are predictable.***" (emphasis in original). IOM, *Dynamics of Disability*, July 2002, p. 10⁶²

1. The Problem of Variation

Over the last several decades, there has also been a substantial shift from legal-

⁶⁰ GAO, October 21, 1999. *Social Security Disability: SSA Has Had Mixed Success in Efforts to Improve Caseload Management*. GAO/T-HEHS-00-22.

⁶¹ SSA, March 1981. *Consistency of Initial Disability Decisions Among & Within States*, SSA Office of Research and Statistics, Staff Paper, no. 39; SSA publications no. 13-11869; IOM, 1998. *The Social Security Administration's Disability Decision Process: A Framework for Research, Second Interim Report*. Institute of Medicine, Committee to Review the Social Security Administration's Disability Decision Progress Research. Available at <http://www.nap.edu/catalog/6194.html>

⁶² IOM, July 2002. *The Dynamics of Disability: Measuring and Monitoring Disability for Social Security Programs*. Institute of Medicine, available at <http://books.nap.edu/catalog/10411.html> , p. 10

bureaucratic approaches to disability determinations (such as protocol-based decision guidelines) to approaches that allow more discretion on the part of ALJs (Diller, 2000).⁶³ Recent analyses have suggested a shift back to a “protocol”-based decision making process may help alleviate some of the variation that has plagued the disability determination process. Because of the variety of standards employed by DDS Adjudicators and ALJs, the fact that they enjoy a large degree of independence in their role as administrative decision makers may contribute to the inconsistency of disability determinations across and within regions (Harders, 1999; Verkuil, 2002).⁶⁴ This independence is questioned by Harders and Verkuil in their analyses.

Finally, while variation among and within regions is a general efficiency concern for SSA, it is also a statutory mandate that it be addressed.⁶⁵ A 1980 amendment to the Social Security Act was introduced to address problems of regional variation at that time. The amendment created more oversight and control responsibilities at the federal level for ensuring consistency of decision making across the programs and revised provisions under which determinations are to be made by State agencies (Pub. L. No. 96-265, Sec. 304(a) 1980).⁶⁶

⁶³ Diller, Matthew (2000). *The Revolution In Welfare Administration: Rules, Discretion, And Entrepreneurial Government* 75 N.Y.U.L. REV. 1121

⁶⁴ Harders, R. Terrence *Striking a Balance: Administrative Law Judge Independence and Accountability* 19 J. NAALJ 1 (1999).; Verkuil, Paul R. *An Outcomes Analysis of Scope of Review Standards* 44 WM AND MARY L. REV. 679 (2002).

⁶⁵ GAO, January 2004. *Social Security Administration: Strategic Workforce Planning Needed to Address Human Capital Challenges Facing the Disability Determination Services*. GAO-04-121, at 8.

⁶⁶ Pub. L. No. 96-265, Sec. 304(a) 1980.

2. Inventory of Proposed Solutions to the Variation Problem

In her October 1999 report to Congress, the Director of the Education, Workforce and Income Security Issues division of GAO, reported that continued disability backlogs were due at least partially to “inconsistent stakeholder support and cooperation” (GAO Oct. 1999, pg. 8).⁶⁷ The report noted that:

“[p]erhaps the single most important element of successful management improvement initiatives is the demonstrated commitment of top leaders to change. Top leadership involvement and clear lines of accountability for making management improvements are critical to overcoming organizations’ natural resistance to change and building and maintaining the organization-wide commitment to new ways of doing business” (GAO Oct 1999, pg. 19).⁶⁸

More recently, the Office of the Inspector General, in its 2001 report on the *Assessment of the Hearings Process Improvement Plan, Phase 1*, identified the problem as one of adequate support and training for DDS examiners and other decision makers. The authors concluded that areas in need of improvement include staffing, training, and ALJ instructions (SSA, *Assessment of the Hearings Process Improvement Plan Phase 1*. June 2001, A-06-00-20051).⁶⁹

Similarly, after it identified problems with recruiting and retaining DDS examiners

⁶⁷ GAO, October 21, 1999. *Social Security Disability: SSA Has Had Mixed Success in Efforts to Improve Caseload Management*. GAO/T-HEHS-00-22; pg. 8

⁶⁸ GAO Oct 21 1999, pg. 19

⁶⁹ SSA, *Assessment of the Hearings Process Improvement Plan Phase 1*. June 2001, A-06-00-20051
Office of Inspector General

as being a primary cause of the inconsistencies seen in the DD process, the GAO offered a series of recommendations about how to address this workforce problem. These recommendations are: 1) Develop a nationwide strategic workforce plan that addresses present and future human capital challenges in the DDS Adjudicators; 2) Issue regulations that establish uniform minimum qualifications for new disability examiners; and 3) Work with DDS Adjudicators to close the gaps between current examiner skills and required job skills (GAO Jan 2004).⁷⁰

D. Human Capital

SSA has faced challenges associated with staffing and training adequate numbers of personnel at all levels of the disability determination process. In particular, SSA has struggled with high turnover rates of disability determination specialists in its regional offices, difficulties in recruiting and hiring, and gaps in key skills necessary to adjudicate a large number of complex disability claims (GAO Jan 2004).⁷¹

1. Issues Related to Staffing, Training, and Stakeholder Buy-in

The reasons for the variation in disability determination decisions described above have been traced in a number of studies to the structure of the workforce charged with this

⁷⁰ GAO, January 2004. *Social Security Administration: Strategic Workforce Planning Needed to Address Human Capital Challenges Facing the Disability Determination Services*. GAO-04-121.

⁷¹ GAO, January 2004. *Social Security Administration: Strategic Workforce Planning Needed to Address Human Capital Challenges Facing the Disability Determination Services*. GAO-04-121.

responsibility (GAO Nov. 2003; SSA June 2001; GAO Jan. 2004).⁷² For example, in 2000-01, SSA carried out an evaluation of the OHA implementation of phase 1 of the hearings process improvement plan (HPI). The objective of the evaluation was to obtain employee assessments of the results of the HPI. Obstacles to efficient case processing included sub-optimal case screening and tracking systems, inadequate pre-hearing analysis and development, lack of accountability, duplication of effort, and uneven workloads among staff. The authors concluded that areas in need of improvement include staffing, training, and ALJ instructions. (SSA, *Assessment of the Hearings Process Improvement Plan Phase 1*. June 2001, A-06-00-20051)⁷³

2. Inventory of Proposed Solutions to the Human Capital Problem

As early as 1989, SSA administration recognized the need to focus on personnel and staff issues as a way to solve problems associated with the backlog and inefficiencies of the review process. In a report on July 25, 1989, one of the three main recommendations to the SSA commissioner was: “The fairness and public credibility of the process can be improved by assigning sufficient staff to Social Security Administration (SSA) district offices (DOs) and to DDS Adjudicators and by improving the attitude and posture of some

⁷² GAO, November 2003. *SSA Disability Decision Making: Additional Steps Needed to Ensure Accuracy and Fairness of Decisions at the Hearings Level*. GAO-04-14; SSA, June 2001. *Assessment of the Hearings Process Improvement Plan Phase 1*. SSA Pub. A-06-00-20051. Office of the Inspector General; GAO, January 2004. *Social Security Administration: Strategic Workforce Planning Needed to Address Human Capital Challenges Facing the Disability Determination Services*. GAO-04-121.

⁷³ SSA, *Assessment of the Hearings Process Improvement Plan Phase 1*. June 2001, A-06-00-20051.

DO and DDS units toward persons seeking benefits or assistance.”⁷⁴

In June 2001, the Office of the Inspector General issued a report describing and evaluating the “New Process” represented by the Hearings Process Improvement plan (HPI). In that report, it noted that the New Process was intended to represent a permanent solution to OHA’s workload issues by the establishment of new positions, workgroups, new and enhanced reports, and features such as development and locator calendars and benchmarks for how long cases should stay at each step of the process. A major change was the establishment of processing groups into manageable, self-contained working groups (SSA June 2001. A-06-00-20051)⁷⁵

The December 2003 GAO report on *Human Capital* outlined a number of areas in which staff and personnel issues needed to be addressed. Primary among these was the first recommendation: “Involve top management, employees, and other stakeholders in developing, communicating, and implementing the strategic workforce plan.”⁷⁶ This recommendation stems from the dual understanding that those closely tied to the process may have the best understanding of what plagues the process and that success in making improvements to the process will require “buy-in” and participation by those stakeholders most directly affected by the changes.

One of the major needs has to do with involving SSA “personnel” in reform

⁷⁴ Disability Advisory Committee, July 25, 1989. *Report of the Disability Advisory Committee to the Commissioner of Social Security*. Department of Health and Human Services, SSA.

⁷⁵ SSA, June 2001. *Assessment of the Hearings Process Improvement Plan Phase 1*. SSA Pub. A-06-00-20051. Office of the Inspector General.

⁷⁶ GAO, December 2003. *HUMAN CAPITAL: Key Principles for Effective Strategic Workforce Planning*. GAO-04-39.

decisions on the micro and macro levels.

The January 2004 GAO report on *Strategic Workforce Planning* began to address this issue by consulting with DDS directors.⁷⁷ This report identified a number of personnel barriers that create certain inefficiencies and inconsistencies, and it made recommendations for how to achieve better workforce competence and retention. The primary problems associated with high turnover rates among DDS included the following: 1) Increased hiring and training costs; 2) Decreased overall examiner skills; 3) Increased examiner caseloads; and 4) Increased claims-processing times and backlogs. The primary causes of these problems were high caseloads, stress, production expectations, highly complex work, and noncompetitive pay.⁷⁸ The report did not gather and utilize direct input from DDS Adjudicators and ALJs.

The importance of buy-in from the Disability Determination Specialists and the Administrative Law Judges who adjudicate SSA disability claims has been described in a number of recent reports. The June 2001 Phase 1 *Assesment of the Hearings Process Improvement Plan* by the Office of the Inspector General and the January 2004 SSA report *Strategic Workforce Planning Needed to Address Human Capital Challenges Facing the Disability Determination Services* the need for stakeholder involvement in any reform process was acknowledged and stressed.

E. Structure of the Review Process

⁷⁷ GAO, January 2004. *Social Security Administration: Strategic Workforce Planning Needed to Address Human Capital Challenges Facing the Disability Determination Services*. GAO-04-121.

⁷⁸ GAO, January 2004. GAO-04-121, at 10, 12, 13, 39.

In this section, we describe issues related to the nature of “due process” for applicants to the programs, the flow of information between participants in the process, and the relationships between those participants.

Because the SSA DD process is an administrative process governed by the U.S. Constitution’s Fourteenth Amendment, the type of “due process” involved in Social Security Disability benefit determinations and appeals process is an important question (Vaughan, 1999; Mashaw 1974, 1983, 1985, 1996a,b,c).⁷⁹ This issue has implications for how information is gathered during the eligibility decision, the form of the hearings and appeals process, and beneficiaries’ rights to have counsel or submit additional evidence for the record. For example, “due process” within the SSA currently requires the appointment of competent legal assistance once a person’s disability is recognized by the administrative agency (Drapkin, 2000).⁸⁰ Currently, about seventy percent of SSDI claimants do have legal counsel at some point during the disability review process,⁸¹ but it is unclear how and under what circumstances this legal counsel is acquired and utilized, and with what

⁷⁹ See, Vaughan, Daniel T. *Ford v. Shalala Applying Mathews v. Eldridge to SSI Benefits* 19 J. NAALJ 145 (1999); Mashaw, Jerry L. *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims* 59 CORNELL L. REV. 772 (1974); Mashaw, Jerry L. *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983); Mashaw, Jerry L. *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985); Mashaw, Jerry L. *Disability, Work, And Cash Benefits* (Ed. with V. Reno, M. Berkowitz & R. Burkhauser) (1996a); Mashaw, Jerry L. *The Environment of Disability Income Policy* (Ed. with V. Reno) (1996b); Mashaw, Jerry L. *Balancing Security and Opportunity: The Challenge of Disability Income Policy* (Ed. with V. Reno) (1996c).

⁸⁰ Drapkin, Robert T. (2000). *Protecting The Rights Of The Mentally Disabled In Administrative Proceedings* 39 CATHOLIC LAW. 317

⁸¹ Only about 30% of SSI claimants have legal counsel during the disability review process.

results.⁸²

1. Issues with the Review Process

First of all, the process is complex, and it requires communication between many stakeholders, who rarely have direct contact with one another. A partial list of stakeholders who might be active participants in the hearings and appeal processes would include the applicant, SSA officials, legal aid attorneys, “advocates” of the applicants, private attorneys, ALJs, Administrative Appeals Judges, physicians, health care service providers, insurance industry representatives, vocational experts, union officials, and representatives of the business community. The exact role of each of these stakeholders is not always clear, and confusion over the division of responsibility may contribute to cases taking longer to resolve than would be considered optimal.

In addition, a number of questions have been raised about the nature of the disability file, including the medical record, and how it is developed and reviewed throughout the process. For example, with respect to quality review of administrative decisions, it has been difficult to assign accountability for decisions made early in the process when the disability file may not have been complete. In addressing this problem, it again is important

⁸² In some cases, the presence of counsel has been shown to reduce the magnitude of awards. See, e.g., Peter Blanck & Chen Song, (2002), *The Americans with Disabilities Act: Civil War Pension Attorneys and Disability Politics*, 35 U. MICHIGAN JOURNAL OF LEGAL REFORM 137 (2002), (describing a historical study of use of counsel to get pensions in the post-Civil war era). However, it has also been shown more recently that certain groups of potential SSI beneficiaries are less likely to be represented by counsel, and that these groups are also less likely to receive benefits. See, e.g., GAO, September 2002. *SSA Disability Decision Making: Additional Measures Would Enhance Agency’s Ability to Determine Whether Racial Bias Exists*. GAO-02-831.

to keep in mind SSA's primary goal of providing accurate and fair disability decisions.

2. Strategies to Improve the Review Process

Creating an electronic disability file that is fully searchable and retrievable at any OHA field office should be (and is) a major goal for SSA in the near future.⁸³ A model for such a system is available in the Veteran's Administration electronic medical record system, and, more broadly, in the Institute of Medicine's 2003 report on *Electronic Health Record Systems* (EHR), which described in detail the key knowledge and technical requirements necessary to develop such a system (IOM 2003).⁸⁴

A number of attempts have been made to propose a "best practice" standard that could be used by DDS Adjudicators and ALJs in making their eligibility decisions that might involved certain "protocols" that could be applied to applicants with certain disability "profiles" (Dolan, 2000; Katz, 1998; Russell, 1998; Rothstein, 2002).⁸⁵ These

⁸³ House Ways and Means Committee, Subcommittee on Social Security, Thursday, September 25, 2003. *SSA Commissioner Barnhart's Testimony, Hearing on the Social Security Administration's Management of the Office of Hearings and Appeals*. Available at: <http://waysandmeans.house.gov/hearings.asp?formmode=detail&hearing=106&comm=4> (last visited Sept. 22, 2005).

⁸⁴ IOM, July 2003. *Key Capabilities of an Electronic Health Record System: Letter Report* (to the Director of the Agency for Healthcare Research and Quality), Institute of Medicine, Committee on Data Standards for Patient Safety, Board on Health Care Services. Available at <http://www.nap.edu>

⁸⁵ Dolan, Catherine J. (2000). *Kildow v. Baldwin Piano & Organ - The Tide Has Turned for Legitimate Carpal Tunnel Syndrome Claims in Arkansas Workers' Compensation Law* 53 ARK. L. REV. 439; Katz, Dennis G. *"Transferability of Skills" and the Medical-Vocational Guidelines Under the Social Security Act* 1998 FED. CTS. L. REV. 5 (1998); Russell, Reed L. *Arguing For More Principled Decision Making In Deciding Whether An Individual Is Substantially Limited In The Major Life Activity Of Working Under The ADA* 47 CATH. U.L. REV. 1057 (1998); Rothstein, Mark A., Serge A. Martinez, & W. Paul McKinney, *Using Established Medical Criteria To Define Disability: A Proposal To Amend The Americans With Disabilities Act* 80 WASH. U. L. Q. 243 (2002).

standards might be different for older claimants who have different skills and/or more functional limitations on their abilities than they are for younger applicants who may have disabilities that limit them in particular employment opportunities but not in others (Pirmantgen, 2000; Chase, 2000).⁸⁶ A suggestion for how such a “protocol” could be developed was offered in the 1998 Institute of Medicine report on *The Social Security Administration’s Disability Decision Process: A Framework for Research, Second Interim Report*. The report laid out a plan for the use of a “statistical screening” of health indicators to be used during the award process, which would allow for rapid, statistical accounting of an individual’s medical profile (IOM 1998).⁸⁷

Another important question raised in the literature has been the amount of deference ALJs should afford to other “authorities” as opposed to their own independent decision-making. Where definitions of disability are concerned, this might mean relying on past legal decisions or statutory definitions (Schuck, 1990),⁸⁸ and in cases of medical interpretations it could mean deferring to established public health authorities such as the Center for Disease Control, the U.S. Public Health Service, and the National Institutes of Health (Bagenstos, 2001),⁸⁹ or more structure involvement of independent treating

⁸⁶ Pirmantgen, Thomas G. *Respecting Your Elders: The "Highly Marketable" Skills Standard for Social Security Disability Claimants over Age Sixty* 65 MO. L. REV. 267 (2000); Chase, Michael C. (2000). *"Transferable Skills" And The Older Claimant's Dilemma: A Call For Allowing Employer Hiring Practices And Other Economic Justifications To Be Relevant In The Decision To Award Disability Benefits* 31 RUTGERS L. J. 553

⁸⁷ IOM, 1998. *The Social Security Administration’s Disability Decision Process: A Framework for Research, Second Interim Report*. Institute of Medicine, Committee to Review the Social Security Administration’s Disability Decision Progress Research. Available at <http://www.nap.edu/catalog/6194.html>

⁸⁸ Schuck Peter H. & E. Donald Elliott, *To The Chevron Station: An Empirical Study Of Federal Administrative Law* 1990 DUKE L.J. 984 (1990).

⁸⁹ Bagenstos, Samuel R. (2001). *The Americans With Disabilities Act As Risk Regulation* 101

physicians (Duddleston et al 2002).⁹⁰ Schuck has also reported on the effects of the rules of deference on ALJs' decisions in administrative proceedings, finding that in areas where a Supreme Court decision was previously rendered, lower courts were more likely to affirm agency decisions (Schuck & Elliot, 1990).⁹¹ This phenomenon has been closely studied since Schuck's initial study, and the balance of ALJ independence and accountability has been scrutinized by scholars attempting to account for the pattern of decisions rendered by ALJs in disability determinations (Harders, 1999; Rosenblum, 1998; Verkuil, 2002).⁹²

The role of the Commissioner as compared with ALJs or the Courts in determining the eligibility of claimants for benefits has also been discussed, suggesting that an administrative procedure could be more consistent, and therefore more fair, than one that relies on the courts and their varying levels of discretion (Mills, 2001)⁹³.

Concerns about quality assurance and accountability for ALJ decisions have prompted some analysts to suggest administrative changes such as closing the disability record at the ALJ stage and involving a government representative at ALJ hearing stage

COLUM. L. REV. 1479.

⁹⁰ Duddleston, David N., Joseph W. Blackston, Marshall J. Bouldin, and C. Andrew Brown (October 2002). *Disability Examinations: A Look at the Social Security Disability Income System*. The American Journal of Medical Sciences, 324(4); 220-226.

⁹¹ Schuck Peter H. & E. Donald Elliott, *To The Chevron Station: An Empirical Study Of Federal Administrative Law* 1990 DUKE L.J. 984 (1990).

⁹² Harders, R. Terrence *Striking a Balance: Administrative Law Judge Independence and Accountability* 19 J. NAALJ 1 (1999); Rosenblum, Victor G. *Toward Heightening Impartiality In Social Security Agency Proceedings Involving Administrative Law Judges* 18 J. NAALJ 58 (1998); Verkuil, Paul R. *An Outcomes Analysis of Scope of Review Standards* 44 WM AND MARY L. REV. 679 (2002).

⁹³ Mills, Charles G. *Is the Veterans' Benefits Jurisprudence of the U.S. Court of Appeals for the Federal Circuit Faithful to the Mandate of Congress?* 17 TOURO L. REV. 695 (2001); It was this relationship and the respective roles of the federal level (the "Secretary") and the ALJs and courts that the 1980 amendment to the Social Security Act sought to clarify (Pub. L. No. 96-265, Sec. 304(a) 1980).

(Verkuil and Lubbers, *Nonadversarial Government Representatives* 2003; SSAB 2001).⁹⁴

The thinking behind these proposals is that such changes would allow more consistency of review and oversight of decision making by ALJs in the review process. Including a government representative in the hearing phase was attempted in the past, but the previous SSARP project by SSA resulted in controversy and a federal district court case banning it, *Salling v. Bowen*⁹⁵ (Verkuil and Lubbers 2003).⁹⁶

The role of internal versus external appeals processes across different federal programs has also been an important area of discussion (Jeffrey, 2002; Gegwich, 1999).⁹⁷ In some cases it has been suggested that grievance and appeals processes might be undertaken by accredited private organizations rather than the current system of various levels of administrative bodies and “independent” judicial actors (Pippin, 2000).⁹⁸ An additional suggestion to create a new type of reviewing body has been offered by SSA

⁹⁴ Bloch, Frank, Jeffrey Lubbers, and Paul Verkuil (2003). *Introducing Nonadversarial Government Representatives to Improve the Record for Decision in Social Security Disability Adjudications*: A Report to the Social Security Advisory Board. Available at <http://www.ssab.gov>

⁹⁵ *Salling v. Bowen* 641 F. Supp. 1046 (1986). This suit was brought by a group of SSA disability applicants challenging an experiment in which a government advocate was present at their disability hearings. The District Court in this case “found that the Social Security program...known as the Social Security Administration Representation Project or Adjudicatory Improvement Project is unconstitutional, the defendant ... are hereby enjoined from any further use of either the SSARP or the AIP ...”, at 1074.

⁹⁶ Bloch, Frank, Jeffrey Lubbers, and Paul Verkuil (2003). *Introducing Nonadversarial Government Representatives to Improve the Record for Decision in Social Security Disability Adjudications*: A Report to the Social Security Advisory Board. Available at <http://www.ssab.gov>

⁹⁷ Jeffrey, Randal S. *The Importance of Due Process Protections After Welfare Reform: Client Stories from New York City* 66 ALB. L. REV. 123 (2002); Gegwich, Christopher G. *Medicare Managed Care: A New Constitutional Right To Due Process For Denials Of Care Under Grijalva V. Shalala* 28 HOFSTRA L. REV. 185 (1999).

⁹⁸ Pippin, Kenneth J. *Increasing Consumer Power In The Grievance And Appeal Process For Medicare HMO Enrollees* 33 U. MICH. J.L. REF. 133 (1999-2000).

itself; Social Security courts and an SSA Court of appeals (SSAB, January 2001).⁹⁹ Furthermore, a suggestion that has been put forth on a number of occasions is to establish an expert advisory panel to provide ongoing leadership, oversight, and technical assistance with respect to ALJ quality assurance reviews (GAO, Nov. 2003. GAO-04-14).¹⁰⁰

The foregoing issues represent some of the greatest challenges to SSA as it works toward improving the administrative review process for its disability programs. Appropriately defining eligibility criteria and monitoring disability over time is an important component of maintaining an efficient, accurate and fair program, as this is the primary strategy for managing flow into and through the disability review process. Consistency of decision making in this process is also a challenge, as variation across and within regions raises questions about the fairness of the process. Decision-making guidelines may help support agency adjudicators, but other staffing and training strategies are also important for developing and maintaining a strong SSA workforce. Finally, the complexity of the DD process is an ongoing challenge for SSA and a potential source of frustration for many participants in the process.

III. PROPOSED RESEARCH AGENDA

Chief among our recommendations is development of a “data environment” that is

⁹⁹ SSAB, January 2001. *Charting the Future of Social Security’s Disability Programs: The Need for Fundamental Change*. Available at <http://www.ssab.gov>

¹⁰⁰ GAO, November 2003. *SSA Disability Decision Making: Additional Steps Needed to Ensure Accuracy and Fairness of Decisions at the Hearings Level*. GAO-04-14.

robust enough to support current and future disability case loads management. This is a necessary prerequisite for any other reform initiative, and in and of itself, would help address many of the problems having to do with long, drawn-out case adjudications and backlog. The data infrastructure needs to be enhanced in multiple ways, including how it is collected, stored, retrieved and shared, and updated throughout the process. Such an environment should support accurate and complete data collection from the first moment a disability claim is filed, throughout the hearings and appeals process, and during attempts by beneficiaries to return to work.

Our second recommendation for research is to involve key stakeholders in the entire reform process, from identification of problem areas, to recommendations for changes, to implementation of new strategies. Finally, we propose a systematic analysis of other administrative programs and agencies as a way of identifying successful “best practices” from other programs that could be adapted to SSA’s disability programs.

Future research should focus on the question of what should comprise the “evidentiary record” to be used in the Disability Determination (DD) Process and what the most effective and efficient role should be for DDS Adjudicators and ALJs in this process. Ultimately, the key question is: what should be considered the best practices that might possibly be employed in the decision-making throughout the DD process?

A. The Data Environment

Reform of the disability determination process is predicated on the need for a nationally consistent application of SSA policies and procedures at the DDS level coupled

with the use of a standard corpus of evidence in the hearings and appeals level, using a common set of best practices to adjudicate cases. At the heart of this requirement is ubiquitous electronic access to all relevant documents and administrative data related to an individual's application for disability benefits and to any subsequent reviews of his or her case. Finally, DDS staff, examiners and/or adjudicators all need electronic access to the entire library of SSA policy and procedure manuals supported by easy to use tools that assist the user in quickly retrieving the exact information relevant to the case at hand. The data environment described here is not currently available.

An important initiative currently underway at SSA is the Accelerated Electronic Disability (AeDib) System (or Electronic Folder project).¹⁰¹ This project has great potential for improving the overall operating efficiency and consistency of disability determination rulings simply by collecting all information relating to an application or case and making it available to appropriate parties. Commissioner Barnhart's proposal calls for the development of an electronic disability claims system that would be accessible at all levels of the process, including the field office, regional office, program services center, State disability determination services, the hearings and appeals office, and the quality assurance staff.¹⁰²

This Accelerated Electronic Disability System (AeDIB) will allow for the creation of an electronic disability folder for each disability claimant, which will be enhanced by use of the Internet, through which claimants will be able to submit evidence to support their

¹⁰¹ SSA Capital Assets Plan (2004), Appendix A, www.ssa.gov/performance/2004/AppendixA-Capital_Assets_Plan_312.doc (last visited Sept. 26, 2005).

¹⁰² See Barnhart Testimony (Sept. 25, 2003), at 2.

claim. This folder will form the basis for decisions at all levels of the process, and it can be updated at all levels, except after the ALJ De Novo hearing, at which point the record will be closed to new information. These process changes will require SSA to focus on future data and information needs as the process is continuously updated to meet the evolving needs of disability claimants and claims adjudicators.

In order for this to work, the electronic folder needs to include all information that is used in making a disability determination, and all other information that would normally be requested during the hearings and appeals process. Having the information collected and readily accessible would also make it possible to determine early on in the process if any information is missing or if any inconsistencies have developed during the history documented in the folder. It is essential that use of the electronic folder not be restricted to claims processing operations only, but that information generated as part of the continuing disability review (CDR) and the hearings and appeals processes be included as well. For example, it might serve SSA's interests to solicit input from the ALJs as to what evidence is most critical to adjudicating cases brought before them and ensure that such information is included in the electronic folders.

The current data environment is primarily paper-based, which makes it difficult to access and review relevant information to eligibility decisions made by DDS staff or rulings made by examiners and ALJs. Difficulty in accessing needed information lends itself to human-based errors or inconsistencies among locations. The complications in accessing information relating to the applicant are exacerbated by the difficulty in getting specific information from policy and procedure manuals that govern the disability

determination process. The Bluebook¹⁰³ and POMS¹⁰⁴ represent a large volume of policy and procedure information that is used by DDS staff to determine if an applicant meets the medical criteria for eligibility. The POMS is frequently updated as procedures are challenged and rulings are made on specific cases. For example, an intuitive search tool that makes it possible to access the most up-to-date information on a particular condition would make it easier to apply the rules consistently.

Taking an inclusive approach to incorporating data into the electronic folders will have important administrative benefits for SSA. Firstly, it will be easier to make new policies that are part of an overall reform effort for the disability determination process based on established patterns in the evidence pertaining to each policy. Secondly, once the policy is implemented the electronic folders will allow easy monitoring of the impact of the policy to see if the desired effect is attained, e.g., regional consistency, speed, or cost reduction. By creating a data driven policy environment as part of disability determination process reform, the principles of a continuous quality improvement process can be incorporated to constantly reinforce policies that are generating the desired impacts and removing policies that have no impact or are detrimental to the process.

As the Commissioner moves forward with implementation of these plans, new data will need to be made available to support the “decision logic” that will pertain to cases as

¹⁰³ The Bluebook (updated January 2005) describes the disability evaluation under Social Security, and is designed to provide physicians and other health professionals with an understanding of the disability programs administered by the Social Security Administration. It explains how each program works, and the kinds of information a health professional can furnish to help ensure sound and prompt decisions on disability claims. The Bluebook is available at: <http://www.ssa.gov/disability/professionals/bluebook/> (last visited Sept. 26, 2005).

¹⁰⁴ The POMS is SSA’s Programs Operations Manual System, and details of this system and regular updates are available at: <http://policy.ssa.gov/poms.nsf/aboutpoms> (last visited Sept. 26, 2005).

they move through the determination process. Even under ideal conditions, the DD process will remain lengthy and complex, so methods will be needed for streamlining the process and better documentation of the “decision logic” employed at each step. It will be important to maintain continuous information flow and continuity of data availability throughout all levels of the process. Successful implementation of the Accelerated Electronic Disability System (AeDIB) will be a crucial first step toward realizing SSA’s overall programmatic goals.

B. Addressing the Issue of Human Capital

The importance of buy-in from the Disability Determination Specialists and the Administrative Law Judges who adjudicate SSA disability claims has been described in a number of recent reports.

Research should focus on the role of DDS Adjudicators, ALJs, and other decision makers, such as the proposed “Reviewing Officials” and “Medical Consultants”, in order to provide a comprehensive understanding of the hearings and appeals processes. Some of the questions that need to be addressed by research into the decision making process include:

1. What types of cases or what issues within cases present the most difficulty for ALJs in terms of making accurate, appropriate, and efficient eligibility determinations?
2. What information about the client and his or her background is most useful to ALJs, and which has lead to more accurate (efficient) decisions when it was available (e.g., could more detailed medical evidence be provided on the 831 form or could medical expert witnesses be involved earlier in the process)?

3. What form of data is most useful to ALJs? Is a complete 831 form sufficient, or would a detailed written record documenting the “decision logic” be more useful?
4. What information is relied on most heavily by ALJs to make disability determination decisions? Why, when, and how have these standards changed over time and what has been the impetus for changing review standards on the part of ALJs?
5. Have changing standards of review created confusion or lead to inconsistency in decision-making? Have standards for decision-making and the resultant outcome patterns changed in relation to specific, identifiable events, such as the Sutton Trilogy decisions in 1999?
6. In developing the “electronic file” for decision-making purposes, what “evidence” needs to be included in this file? What types of information will be most critical for the ALJs?
7. What are the effects of attorney/client representation on the ALJ’s determination? What characteristics of the case makes an attorney more likely to be involved in the process (severity of disability or size of claim) and are claimants who have attorney representation more likely to make a successful claim for disability benefits?
8. To what extent are the ALJs and DDS Adjudicators aware of the areas that are truly most problematic in the DD process?
9. What are ALJs’ and DDS Adjudicators’ perceptions about the apparent failure of past reform efforts, such as the Hearings Process Improvement Plan (HPI)? Have there been problems with “buy-in” by ALJs, DDS Adjudicators and other actors? What are their recommendations for increasing “buy-in” and ensuring more success in future reform efforts?

The answers to these questions, taken together, should provide a basis for effective evaluation of the causes of problems, and development and implementation of reform strategies to address those problems.

C. Best Practice Models from Other Programs

There are a number of potential sources of information about “Best Practices” for administrative procedures. The Administrative Law Judge (ALJ) arrangement is an administrative hearing and adjudication structure used in a number of areas of legal and policy interpretation at the state and federal level. There are at least ten distinct areas of law that use ALJs somewhere in the administration of claims, appeals, and quality review. These include: 1) Public Health Laws; 2) Human Rights Laws, including disability laws; 3) Motor vehicle licensing; 4) Environmental protection and pollution control; 5) regulation of the professions; 6) Tax law; 7) Unemployment insurance; 8) Regulation of Public Utilities; 9) Public Assistance Programs, including welfare; and 10) Workers’ Compensation. All activity by ALJs and related officials are governed by the Administrative Procedures Act (APA), which sets standards for rules, protocols and agency interactions with ALJs.

Among the agencies in which the ALJ structure is used extensively are the Veteran’s Administration (VA), the Department of Labor (DOL), the Department of Agriculture (DOA), the Environmental Protection Agency (EPA), the Department of Housing and Urban Development (HUD), and the Federal Labor Relations Authority (FLRA). The VA system in particular has been compared for analytical purposes to the SSA system in terms of its ALJ Hearings and Appeals process (Paul Verkuil & Jeffrey Lubbers, March 18, 2002).¹⁰⁵ In terms of the types of claims adjudicated by the agency, the relevant systems comparatively appear to be the VA, HUD and Workers’

¹⁰⁵ SSA, March 1, 2002. *Alternative Approaches to Judicial Review of Social Security Disability Cases: A Report to the Social Security Advisory Board*. Paul Verkuil & Jeffrey Lubbers. Contract no. SSA-RFG-02-0026.

Compensation. The FLRA and DOL also have relevant structures comparatively.

Medicare and the private health insurance industry may offer promising models for reform. The appeals process for an average health insurance contract is relatively short when compared to that of Medicare. It has been suggested that the positive aspects of private health insurance claims adjudication may be applied to Medicare and SSA proceedings (DeJonker, 2000).¹⁰⁶ In addition to appeals taking less time, the structure of the appeals process in many private health insurance arrangements is also less complex than that of SSA's hearings and appeals process, and this may be part of the reason that appeals take less time. It is the process differences that we are suggesting may provide an example of a "best practice," which SSA may consider in its H & A reform agenda. The nature of the "best practice" analysis is to look for specific techniques, strategies, and processes that have produced successful results, and suggest ways that those practices may be modified or adapted and then applied in a new context. Future research should evaluate the extent to which successful best practices for claims adjudication exist in the Medicare program and in private health insurance arrangements and whether they hold promise as a model for SSA's reform agenda.

This approach is not completely novel. In January 2001, GAO issued a third-in-a-series report that offered lessons from other programs and foreign countries for return-to-work practices (GAO-01-153, Jan 12 2001; GAO/T-HEHS-00-151, July 13, 2000; GAO/HEHS-96-133, July 11 1996).¹⁰⁷ While the report's emphasis was on return to work,

¹⁰⁶ DeJonker, Jason J. (2000). *Medicare Appeals and Interpretation: Meeting the Reasonable Expectations of Medicare Users Through a Comparison to Private Health Insurance* 8 ELDER L.J. 103

¹⁰⁷ GAO, January 2001. *SSA Disability: Other Programs May Provide Lessons for Improving Return-to-Work Efforts*. GAO-01-153.; GAO, July 13, 2000. *SSA Disability: Other Programs May*

it made it clear that “Adopting a comprehensive return-to-work strategy will require fundamental changes to the underlying philosophy of the DI and SSI programs.” (GAO-01-153, p 40).¹⁰⁸ Our proposed research agenda addresses one aspect of the “underlying philosophy” by applying the notion of best practices to the hearings and appeals process.

This best practice research will undoubtedly produce knowledge that is useful beyond SSA’s purview, and successful reforms undertaken by SSA may indeed become models for other agencies. For example, the General Accounting Office (GAO) recently completed an evaluation of the Veterans Benefits Administration’s (VBA) disability claims process and found a number of areas in which its accuracy and accountability standards could be improved (GAO, Sept. 2003b).¹⁰⁹ In particular, variations across regions in terms of accuracy and allowance rates were problematic, as has been reported in the SSA DD process (GAO Nov. 2003; GAO Sept 2003a; IOM 1998; SSA, 1981).¹¹⁰ However, the number of claims filed with the VBA is small (400,000 annually) compared with that of

Provide Lessons for Improving Return-to-Work Efforts. GAO/T-HEHS-00-151.; GAO, July 11, 1996. *Social Security Disability: Backlog Reduction Efforts Under Way; Significant Challenges Remain.* GAO/HEHS-96-87; GAO, July 11, 1996. *SSA Disability: Return-to-Work Strategies from other Systems may Improve Federal Programs,* GAO/HEHS-96-133.

¹⁰⁸ GAO, January 2001. *SSA Disability: Other Programs May Provide Lessons for Improving Return-to-Work Efforts.* GAO-01-153., p 40

¹⁰⁹ GAO, September 2003. *Veterans’ Benefits: Improvements Needed in the Reporting and use of Data on the Accuracy of Disability Claims Decisions.* GAO-03-1045.

¹¹⁰ GAO, November 2003. *SSA Disability Decision Making: Additional Steps Needed to Ensure Accuracy and Fairness of Decisions at the Hearings Level.* GAO-04-14.; GAO, September 2003. *Veterans’ Benefits: Improvements Needed in the Reporting and use of Data on the Accuracy of Disability Claims Decisions.* GAO-03-1045. ; IOM, 1998. *The Social Security Administration’s Disability Decision Process: A Framework for Research, Second Interim Report.* Institute of Medicine, Committee to Review the Social Security Administration’s Disability Decision Progress Research. Available at <http://www.nap.edu/catalog/6194.html> ; SSA, March 1981. *Consistency of Initial Disability Decisions Among & Within States,* SSA Office of Research and Statistics, Staff Paper, no. 39; SSA publications no. 13-11869.

the SSA, though given the war in the Middle East these figures should be expected to rise substantially in the coming years and decades. Thus, a precedent may be set by SSA in its examination of the DD process that could have far-reaching implications in other areas of disability programs administration, such as the VBA.

Also of interest in this “Best Practice” analysis will be models that exist in other countries.

Some of the questions that should be addressed by researchers looking at models for administrative best practices include:

1. What programs use similar hearings and review processes for eligibility determinations and what aspects of these programs are relevant for the SSA process?
2. What are the best practices from other realms of administrative law that could be applied to the SSI and SSDI areas?
3. What are the best practices or innovations in the areas of medical (Medicare or Medicaid) and vocational (Workers’ Compensation) evaluation that can be used to improve the benefit determination decisions in SSI and SSDI?
4. With respect to these best practices, what methods, procedures, or techniques might be identified to: (1) reduce the error rate in eligibility determination; (2) ensure accurate and consistent judgments about work capacity of the disabled; (3) reduce the waiting period between stages in the process; (4) increase the cost-effectiveness of the process; and (5) use administrative personnel and outside experts in the best possible way?

The database created by this type of research would be a crucial source of information for SSA and other agency administrators as they evaluate programmatic goals and strategies to improve program performance.

IV. IMPLICATIONS AND CONCLUSIONS

The prominence of the Social Security Administration’s disability programs as the largest income replacement programs for people with disabilities in the United States means that successful reform by SSA will have profound effects on current and future beneficiaries. And, given its importance to people with disabilities, making the wrong choices could have disastrous implications for current and future beneficiaries. Such reform will likely also have important spill-over effects for other government disability programs, both because some disability beneficiaries move between programs, and also because, as the largest programs, SSI and SSDI can set an example for those other programs in terms of eligibility criteria, administrative procedures, and return-to-work incentive initiatives. Over the years, SSA has been diligent in pursuing reforms that would enhance the management of its disability programs, and the current proposals by the Commissioner of SSA are another important step in the overall process of program enhancement. However, for a variety of reasons and despite multiple small steps forward, SSA has not yet been able to achieve large-scale reform of the nature and scope that had been hoped and strived for. When the historical perspective is taken into account, it becomes apparent that for twenty years SSA and related agencies have been attempting to reform their disability programs in many of the areas described in this paper. Unfortunately, many of the initiatives that SSA envisioned would lead to far-reaching improvements have been scaled back as obstacles have encountered during implementation.

The application of previous experience with “best practices” from other areas of program administration has the potential to provide guidance for the overall improvement process at SSA. Such research would offer a fresh perspective and approach to the reform

repertoire by extending the field of viable solution options beyond those which has thus far been attempted.

Finally, based on the data from key stakeholders in the DD process and on analyses of best practices from other areas of administrative law and health care programs, future research might provide the basis for making recommendations for improvements that could streamline the DD process, making it more efficient and ensuring that it is a fair, appropriate, and effective process for claimants and other stakeholders. A data-driven research base such as we have proposed would support SSA and its constituents in reaching both its goals.