What We Should Do About Social Security Disability

A response to Richard J. Pierce, Jr.

BY JEFFREY S. WOLFE and DALE D. GLENDENING

In an article in the Fall 2011 issue of *Regulation*, George Washington University law professor Richard J. Pierce, Jr. considers the rising cost of Social Security disability benefits and asks (in the words of his title), "What Should We Do about Social Security Disability?" He posits that the program's woes lie in its administrative law judges (ALJs), who hear appeals from initial Social Security Administration (SSA) determinations to deny benefits to individual applicants. He concludes that what needs to be done is "to abolish the ALJ-administered part of the disability decisionmaking process."

In his view, to quote an American idiom, judges are giving away the store. Pierce points to significant increases in the numbers of persons applying for and being adjudicated as "disabled" under the Social Security Act. He refers to statistics showing increases in the raw numbers of applications for Social Security disability benefits and notes a "28 percent" increase in the number of favorable decisions between 2007 and 2010, attributing this in large measure to *de novo* decisions by administrative law judges who are reversing underlying administrative denials. He asserts that judges are responsible for the all-but-wrongful award of billions in disability benefits.

We respectfully disagree. The Social Security Act itself and the outdated jurisprudence underlying the current hearings and appeals system are the problem. Thus Congress and the SSA, rather than administrative law judges, should be the focus of Pierce's criticism.

Social Security Disability

Disability determinations are initially made following a paper review by a federally funded "State Agency" (typically called "Disability Determination Services") present in each of the 50 states by agreements entered into with the SSA. These administrative determinations are made by state employees: disability examiners (DEs) supervised by medical professionals. These "determinations" (not "decisions" under governing regulation) are not a product of "hearings" as mischaracterized by Professor Pierce in his earlier article, but are instead unilateral considerations of documentary evidence supporting a claimant's application, tempered by additional medical development. The claimant does not have an opportunity to respond to the agency's findings or opinions, nor is the claimant generally asked to respond to discrepancies in the application. "Development" by the agency includes obtaining treatment records and, when there is a paucity of such information, sending the claimant to a medical examination at government expense to

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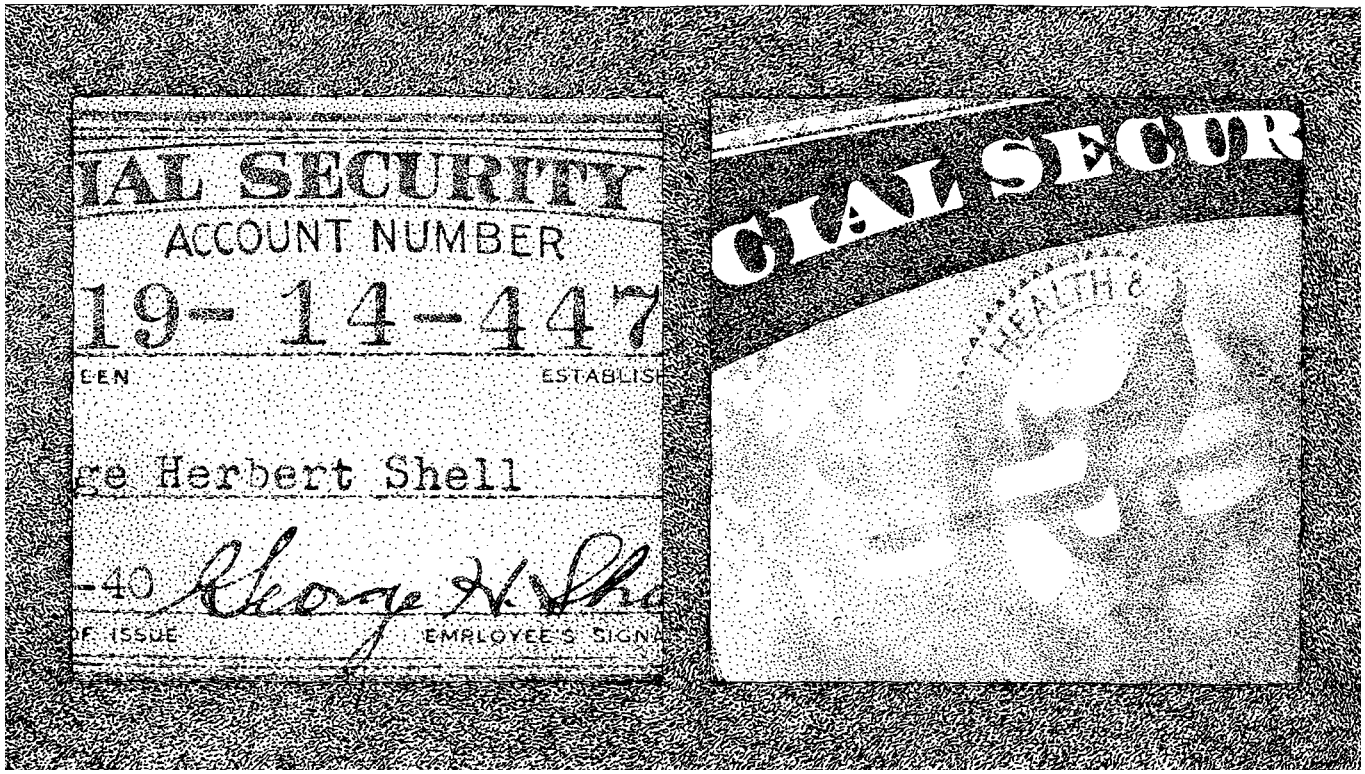
The opinions expressed in this article are solely those of the authors and do not represent the views of the U.S. Government, the Social Security Administration, or any of its components.



assess alleged mental or physical conditions ("impairments"). A federal reviewing body, the Disability Quality Branch, monitors this determination process, sometimes rejecting proposed favorable awards for reasons of "programmatic integrity."

The legal paradigm by which disability determinations are made—and which governs later decisionmaking by administrative law judges—is a "5-step sequential evaluation." The 5-step analysis looks to legal, medical, and vocational factors, with potentially favorable decisions made as a result of a defined medical condition (mental, physical, or both) or as a result of functional limitations arising out of an impairment or a combination of impairments. The decisionmaking standard is, however, ultimately a question of law: the judge makes findings of fact and law based on a legal analysis at each step of the 5-step sequential evaluation, all by a preponderance of the evidence.

The claims process is relatively straightforward. A claimant makes an initial application for disability benefits and, if denied, within 60 days seeks "reconsideration." If denied again, he or she may appeal—again, within a short 60-day window—requesting an in-person hearing before a federal administrative law judge. The hearing is the first opportunity a claimant has to present his or her case in person, as the initial and reconsidered determinations are essentially paper reviews. This transition—from state agency consideration to an appearance before a judge—is accompanied by critical jurisprudential changes.

First, unlike the state agency's determination, the judge is not bound to decide in accord with the Program Operations Manual System (POMS). POMS is a comprehensive administrative interpretation by the SSA of its regulations, required to be applied by state agency personnel when addressing applications for disability benefits under a variety of factual scenarios. Instead, judges look to statutes, governing regulations, and policy interpretations by the SSA in the form of Social Security Rulings, as well as case law.

Second, a defined jurisprudence has arisen, created by the interplay of statutory law, government regulation, and case law, such that the claimant bears the burden of proof to show by a preponderance of the evidence that he or she can no longer perform his or her past work as a result of one or more disabling "impairments." If the claimant satisfies this burden, the burden then shifts to the commissioner of Social Security to show—again, by a preponderance of the evidence—that there remain "significant numbers" of other jobs that the claimant can still perform, despite his or her impairments and resulting limitations.

Third, the claimant is entitled to an "on the record" hearing in which there is a record made of the proceedings. This is a dramatically different proceeding than the underlying administrative/bureaucratic initial and reconsidered determination in that the claimant may present witnesses and testimony in addition to his or her own statements and allegations. At such a hearing the claimant is entitled to present written and oral evidence, testify, take testimony of witnesses, and may be represented by counsel (either an attorney or non-lawyer representative consistent with governing regulations found at 20 C.F.R §404.1740 *et seq.*). Among the witnesses who may testify are vocational experts and medical experts—physicians, psychologists, optometrists, and other health care professionals. Such witnesses may be requested by the judge or the claimant. The judge thus considers not only documentary medical evidence, but medical expert testimony and corresponding expert medical opinions.

ILLUSTRATION BY MORGAN BALLARD

Why Have A Hearing?

Professor Pierce asks why not simply allow the state agency's determination, made without giving the claimant the opportunity to present witnesses and testimony, to stand as the final agency decision. In urging such a result, he evidently puts his faith in a bureaucratic decision, casting aside the merits of a proceeding before an impartial adjudicator.

The current administrative structure, without judges, offers just such a model and arguably could be made to work as follows: The claimant's application, once determined to be "fully developed" (but what if the claimant contends the record is not "fully developed?") is considered by the state agency and a determination made—not with the involvement of judges or representatives, but by DEs under the supervision of medical doctors and psychologists. If the claimant disagrees, he or she may then ask for "reconsideration" by the same administrative body. As there would be no further appeals beyond the request for reconsideration, the claim would end there.

Would this solve the problem as framed by Professor Pierce? Two out of three persons who initially apply for Social Security disability benefits are denied at the initial determination and reconsideration stages. Thus, for Professor Pierce, the answer is yes. Abolish the judges, for they are the ones accountable for the expansion of the number of persons receiving disability benefits, deciding appeals from administrative denials that he does not "believe" to be "accurate." The result: an entirely bureaucratic decision, responsive to a political infrastructure unrestrained by justice, with no opportunity for the claimant to be heard.

The Problem Is the Law, Not Administrative Law Judges

Consider Professor Pierce's specific criticisms of the role of judges in the current regime as weighed against the realities of the hearings process.

Subjective decisionmaking? | He asserts that "ALJ decisionmaking is 'subjective' and 'indefensible.'" While the assertion that judges' decisions are "subjective" or "indefensible" makes a tidy sound bite, it is by definition a complete mischaracterization. If the statement is accepted on its face as a critique of judges who should instead be making "objective" decisions and who are, as a result, not doing their jobs—and who, consequently, should be dismissed from their positions if they are making "subjective" decisions—then all judges in all courthouses throughout the land should be dismissed.

The task of "judging," by its very nature, is not science. By definition, a critique of judging cannot be an assessment of whether the judge found the "correct" answer, for there often is no single "correct" answer. Rather, the question at bottom is whether justice has been served. "Justice" is an intangible—not constant nor easily defined, varying and dependent upon the nature of the case, facts presented, application of a combination of various laws and regulations, findings made upon evaluation of testimony, documentary evidence, and the record as a whole, taking into account the parties' circumstances.

Adjudicating disability is fundamentally no different than that of any other decision made by a judge in the deliberative process—assessing alleged facts, analyzing and weighing the evidence as a whole, evaluating the credibility of the claimant, and ultimately applying the law to the findings of facts. Apart from the unique jurisprudence attendant to Social Security disability hearings, the task of judging these cases is no different from the task undertaken by any judge when deciding other cases. All judges will not decide the same case the same way, work or adjudicate in the same style or at the same pace. There is, as in all cases, no single "correct" answer in any given case, but rather a judgment made. Any other conclusion is nothing short of mischaracterization.

Pierce similarly asserts, "There is no basis for the belief that ALJ decisions are more likely to be accurate than decisions made by two independent examiner/medical teams." First, the assertion of "accuracy" as a standard against which judges' decisionmaking is measured is, again, a mischaracterization of the judicial decisionmaking process. The judge is not deciding whether the claimant is disabled as a medical fact, but rather whether the claimant is entitled to an award of disability benefits as a matter of law, in conformity with the law and public policy established by the Social Security Act. The judge's decision considers a legal standard that, in turn, looks to medical and vocational evidence, taking also into account the claimant's education, age, and past work, all measured against an entitlement framework grounded on a 5-step legal analysis. Those steps are as follows:

1. The judge must first ascertain whether the claimant is engaged in substantial gainful activity. Generally, a claimant who is working full-time is not disabled, regardless of the medical findings. If not, the inquiry proceeds to the next step.
2. The judge must next determine whether the claimed impairment is "severe." A "severe impairment" must significantly limit the claimant's physical or mental ability to do basic work activities and must last or be expected to last 12 months or result in death.
3. The judge must then determine if the impairment meets or "equals" in severity the criteria for impairments described in the Listings of Impairments, found at Appendix 1 of the regulations (Title 20 Code of Federal Regulations, Part 404, Sub-Part P, Appendix I).
4. If the claimant's impairment does not meet or equal a listed impairment, the judge must determine whether the claimant, given his residual functional capacity, can perform his past work despite any limitations.
5. If the claimant cannot perform his past work, the judge must decide whether the claimant can perform any other competitive work in the economy. This determination is made considering the claimant's age, education, work experience, and residual functional capacity.

Thus it is entirely possible that the claimant is functionally limited but not medically "disabled" from all work—and yet still be entitled to an award of disability benefits. This is because the Social Security Act and its implementing regulations embrace various presumptions as a matter of law that an individual is "disabled" given certain findings, made both at Step 3 and Step 5 of the 5-step sequential analysis:

- At Step 3, if a claimant's impairment or combination of impairments match or are medically equivalent in severity to an impairment described within the Listings of Impairments, the claimant is presumed "disabled" without need of establishing specific functional limitations.
- At Step 5, the Medical-Vocational Guidelines (Appendix 2) are employed. These guidelines, popularly referred to as "the Grids," establish presumptive rules indicating an individual is "disabled" or "not disabled" depending upon exertional capability, age, education, and past work experience (transferable skills). Thus, a 50-year-old, limited to sedentary work (and in fact able to perform sedentary work), with no transferable skills to other work, with a high school (or less) education is presumed "disabled"—the presumption being that the number of competitive jobs available for such an individual is so reduced as to warrant a finding of "disability."

Second, Pierce errs when he asserts that "the ALJ has no medical adviser." Integral to the underlying administrative record, the judge has the benefit of medical and psychological consultative examinations undertaken by the state agency as part of their duty to develop the record. Indeed, the underlying administrative record often includes expert medical and psychological opinions from non-examining state agency medical experts. These opinions are treated as expert opinions and must be considered in any decision reached. More cogently, the judge and/or the claimant may request a medical expert—a medical doctor, psychologist, optometrist, etc.—be present to testify as an expert witness. Alternately, medical and/or psychological interrogatories may be proffered to such experts.

Finally, the claimant may request and/or the administrative law judge may order, *sua sponte,* consultative examinations that are frequently more comprehensive than those that may have been undertaken earlier at the behest of the state agency. Often such examinations are requested because documentary records of evidence are stale or fail to properly or adequately address newly alleged medical impairments. Thus it is incorrect to say that the judge has "no medical adviser" when, in fact, medical expert witnesses may and do testify as part of the disability hearings process.

Inadequate explanations? | Professor Pierce also asserts:

> The SSA could reinstitute some version of the ALJ quality control programs it implemented in the1970s. The SSA should establish a presumptively acceptable range of favorable and unfavorable decisions. The agency and the MSPB [Merit Systems Protection Board] could conduct joint rulemaking to issue a rule ... that authorizes the agency and the board to remove or otherwise discipline an ALJ for deviating from the presumptively permissible range of decisions without adequate explanation.

Should administrative law judges be "controlled" so as to limit their decisionmaking to a "presumptive permissible range of decisions" with potential removal from office if there is not "an adequate explanation" when deviating from this range? Would this not contradict the very ideal of a "judicial" decision? Inherent in the concept of an adjudicated decision by an independent decision-maker under the Administrative Procedure Act is the ability of the decisionmaker to make decisions absent coercion. See, e.g., *Nash v. Bowen*, 869 F.2d 675 (2nd Cir. 1989), wherein the court held, *inter alia*,

> Thus, the Secretary's efforts through peer review to ensure that ALJ decisions conformed with his interpretation of relevant law and policy were permissible so long as such efforts did not directly interfere with "live" decisions (unless in accordance with the usual administrative review performed by the Appeals Council).

Does any reasonable, fair-minded person sincerely believe that potentially subjecting every administrative law judge to discipline or removal for decisions for which there is not an "adequate explanation" is not coercion per se? The specter of discipline based solely on the decision reached raises images of Soviet-era justice behind the Iron Curtain. Is this the America envisioned by our founding documents—such that judges are subjected to discipline if they do not conform to a bureaucratic worldview, regardless of the facts presented or are otherwise pressured to deviate from procedural or substantive regulations that they are professionally obligated to uphold as officers of the courts? To threaten judges with censure, removal, or discipline in response to their decisions is to become something fundamentally alien to our system of justice, whether it be in the administrative judiciary or otherwise.

Nonexertional limitations | Professor Pierce likewise asserts:

> Nonexertional restrictions ... have ... no objective diagnostic criteria that can be used to measure the degree of an applicant's anxiety, depression, or pain ... [and] can neither be supported nor refuted based on application of objective diagnostic criteria.

Nonexertional limitations (not "restrictions") flow from impairments—physical, mental, or both. Pierce criticizes what he terms "nonexertional disabilities," citing the requirement that the administrative law judge award benefits when he determines there is a "nonexertional restriction." Without belaboring the point, such comments do not factually or legally describe the conceptual framework underlying the Social Security disability paradigm. The implementing regulations speak in terms of "impairments" and resulting "limitations" of function, not "restrictions." Pierce complains there are no objective criteria that can be used to measure the degree of an applicant's anxiety, depression, or

pain, concluding that "at some point in life, almost every person can make a plausible claim of eligibility for permanent disability benefits based on nonexertional restrictions." Such broad generalities do not, in fact and as a matter of law, describe the actual functioning of the disability determination process.

To be adjudicated "severe" at Step 2 of the 5-step sequential analysis, an impairment must be medically determinable and satisfy a durational requirement, such that the impairment must have lasted or be expected to last 12 months or result in death. The U.S. Supreme Court examined this issue in *Barnhart v. Walton* (2002), upholding a denial of benefits where the individual returned to work in the 11th month—thus, not meeting the 12-month durational requirement. The claimant argued that he should have been entitled to benefits because at the time the initial bureaucratic determination was made, the agency—looking to the future—should have concluded that his impairment was reasonably expected to last 12 months. By the time of his appeal to an administrative law judge, the claimant had returned to work in the 11th month. The Supreme Court upheld the statutory scheme imposing the durational requirement, further holding that, "[o]f course, administrators and judges are capable of answering hypothetical questions of this kind." So while it may or may not be true, as Pierce asserts, that "at some point in life, almost every person can make a plausible claim of eligibility for permanent disability," whether such a claim would actually be granted is far from the seeming whimsical process he implies.

In fact, the Social Security disability regulatory scheme establishes a straightforward causal relationship between "impairments" and resulting functional "limitations." Governing regulations require that allegations of pain be supported by objective medical evidence, such that the allegations made are reasonably related to the underlying medical cause. In assessing the relationship between alleged "nonexertional limitations" such as "pain," the evidence as whole must be considered and there must be objective medical evidence to support the nature, intensity, and duration of alleged pain. Title 20 C.F.R. §404.1529 provides in part:

> We will consider all of your statements about your symptoms, such as pain, and any description you, your treating source or nontreating source, or other persons may provide about how the symptoms affect your activities of daily living and your ability to work. *However, statements about your pain or other symptoms will not alone establish that you are disabled; there must be medical signs and laboratory findings which show that you have a medical impairment(s) which could reasonably be expected to produce the pain or other symptoms alleged* [emphasis added] and which, when considered with all of the other evidence (including statements about the intensity and persistence of your pain or other symptoms which may reasonably be accepted as consistent with the medical signs and laboratory findings), would lead to a conclusion that you are disabled. In evaluating the intensity and persistence of your symptoms, including pain, we will consider all of the available evidence, including your medical history, the medical signs and laboratory findings and statements about how your symptoms affect you.

In addressing the efficacy of the Medical-Vocational Guidelines, the Supreme Court observed that the "regulations recognize that the rules only describe 'major functional and vocational patterns.' 20 CFR pt. 404, subpt. P, app, 2 § 200.00(a)." The Court further held that "[i]f an individual's capabilities are not described accurately by a rule, the regulations make clear that the individual's particular limitations must be considered. See app. 2, §§ 200.00(a), (d)."

So while there is no such thing as a "pain-o-meter" such that one can objectively measure what is otherwise, by definition, a subjective human experience, the regulatory framework and attendant case law recognize that pain is a reality of the human condition. Decisions that address impairments that are themselves "nonexertional" or that otherwise give rise to "nonexertional" limitations are subject to the same legal standard as those that are wholly exertional. The impairments must, as with all impairments, be adjudged to be "medically determinable" and have lasted, or are expected to last, 12 months or result in death. Nonexertional impairments and/or limitations are well recognized and documented by health care providers throughout the spectrum of health care services, as is evident in the professional practices of psychologists, psychiatrists, and pain management physicians, among others, not to mention the codification of such impairments, as in the American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (4th Edition).

Representing the SSA | Professor Pierce suggests that the SSA "[a]ssign agency lawyers to represent the government in disability hearings." We agree that the government—that is, the SSA—should be represented in the disability hearing before the administrative law judge. However, in adopting such a proposal, more is required than simply the placement of another lawyer in the hearing room. A comprehensive and fundamental reassessment of the 1950s jurisprudence that still obtains today (the "old jurisprudence") must be undertaken as part and parcel of any such proposal.

Though the SSA originally envisioned an administrative appeals process without claimants' representatives, claimants' representatives are integrally a part of the extant system—and have been for decades. Despite this, no change has been made to the jurisprudence of the system and it exists essentially as it has from the beginning, designed without contemplation of the presence of claimants' representatives. A 1968 *Mississippi Law Review* paper by Robert M. Viles noted that "between January 1966 and July 1967 claimants were represented by attorneys in about 19% of the cases decided by Hearing Examiners." In the span of 40 years, the statistics have virtually become mirror-images of one another; where 80 percent of all persons were unrepresented in 1968, by 2006 80 percent of all persons were represented. The effect of such representation cannot be underestimated.

The present system was clearly designed for (1) far fewer appeals hearings than now exist, and (2) hearings without representatives. The current jurisprudence reflects these assumptions, made in 1935 when the Social Security Act was passed, and in

1954 when the first disability provisions were added.

The presence of so many more lawyers and representatives has meant a dramatic increase in the filing of disability benefits, by orders of magnitude. The essential problem lies in the inability of the nonadversarial jurisprudential structure of the current adjudicative system to absorb these increased numbers. The current system will "backlog"—as it has over the past 30 years—when tasked with handling even a fraction of the number of current pending appeals because the inherent infrastructure of the system fails to seek and employ maximal utility of its most critical players. It is not surprising that the system fails to timely dispose of pending cases, allowing more recent claims to stagnate in a growing backlog, for this system does not routinely allow resolution of appeals without a hearing. There is no mechanism akin to the "settlement" process in the courts that allows lawyers to resolve disputes without significant intervention of the assigned judge. This is doubly complicated by the absence of formal rules of procedure and evidence, leaving the system open to ad hoc maneuvering by counsel, causing yet further delay.

The decisionmaker was—and is today—tasked with not only deciding the case, but ensuring that the claimant has adequately prepared his or her claim—a job normally reserved to a party and his or her lawyer. In an era when few claimants were represented and the number of pending appeals numbered nationally in the five-figures (as opposed to nearly three-quarters of a million cases today), the system worked—a tribute to the underlying philosophy to assist those who were perceived as less able to assist themselves either as a result of age or infirmity. The jurisprudence of the day—a mid-20th century adjudicatory system—worked well in the 20th century.

What Should Be Done

We respectfully suggest the answer to Professor Pierce's question of "What Should We Do about Social Security Disability?" is not to eliminate administrative law judges but, rather, to do the following:

- Engage in a top-to-bottom review of the purpose of the Social Security disability program, asking, as a matter of public policy, whether the program should reconsider the definition of "disability" and, in so doing, redefine the basis for the award of such entitlements. The problem is not new. According to Viles' 1968 paper, the House Ways and Means Committee in 1967 was already concerned about the "the breadth of disability entitlement." The committee's concerns sound remarkably similar to Professor Pierce's: "Over the last four years the number of disability allowances was larger than the number estimated. Because there is no evidence to indicate that the proportion of the disabled in the country is greater now than four years ago, the committee is forced to conclude that over a period of years a number of subtle changes may have occurred in the concept of the 'disabled worker.'"
- Re-examine the question whether an independent corps of administrative law judges should be created, allowing for review of administrative decisionmaking in the executive branch through a central panel of administrative law judges. See Robin Artz's article, listed in the Readings below.
- Implement a fundamental change in jurisprudence attendant to *de novo* hearings before administrative law judges in appeals from the underlying Social Security administrative determination, including the presence of a government lawyer. See Jeffrey S. Wolfe's article, listed in the Readings below.
- Attendant to the foregoing re-articulation of the governing jurisprudence, institute defined "rules of evidence" and "civil procedure," and consider whether, in implementing such rules, a limited power to sanction noncompliance should also be given the administrative law judge.

The history of the Social Security disability program reveals a steadily expanding program—embracing more and more persons in American society and a more expansive definition of disability itself. The disability program began in 1954 with the "disability freeze" that protected disabled workers from having their Social Security benefits penalized as a product of lost work years following their injuries. In 1956, disability insurance benefits were made available for disabled persons who had at least attained the age of 50. This was expanded in 1958 to include "dependents' benefits." In 1965, a fundamental change in the basic definition of disability was passed and "deleted the requirement that the impairment be of 'long-continued and indefinite duration' and substituted in its place a requirement that the impairment 'be expected to last for a continuous period of not less than 12 months.'" Widows and widowers' benefits were added in 1967.

A dramatic change to the disability program occurred in 1972 with the adoption of the Supplemental Security Income (SSI) disability program under Title XVI of the Social Security Act. Among other changes, this sweeping legislation authorized disability for children "disabled before age 22." As the SSA explains in its website history of the disability program:

> [T]he program was intended to supplement the income of needy persons who had attained age 65 or were blind or disabled and who received no or only minimal benefits under the Social Security insurance program. Unlike the insurance program, eligibility for SSI payments is based on need, requiring an assessment of the person's income and resources.

In 1980, multiple changes were made, including Social Security's enactment of the Medical-Vocational Guidelines, incorporating presumptions of disability based on education, work history, age, and exertional capability. The 1980 change also expanded trial work incentives and extended eligibility while working. While a continuing disability review was enacted requiring review of disability benefits every three years, so too was the ability to continue receiving benefits through the appeal to an administrative law judge—thus, seemingly incentivizing such appeals.

The 1984 amendments to the Social Security Act permitted

persons to apply for disability even though they did not have a single "severe" impairment, enabling entitlement where a "combination" of non-severe impairments could be the basis for an award. Codification of the requirements on how to evaluate pain came as a part of these amendments.

It is evident from even this cursory review of the history of the disability program that Congress and, derivatively, the SSA have gradually expanded the availability of entitlements to greater and greater numbers of persons. Yet little has been done to address the jurisprudence underlying the appeal process to administrative law judges. The adjudicatory system, unlike the entitlement provisions, has remained jurisprudentially static and has become gradually overwhelmed by increasing numbers of appeals.

The increased award of benefits is a direct result of expanded legislation, finding its roots within expanded entitlement criteria. The dramatic increase in lawyers and non-lawyer representatives in disability appeals is also critical. In 1971, only 19 percent of all persons applying for disability were represented, as contrasted with more than 80 percent today. This striking escalation is plainly a significant contributing factor in the increase in award of disability benefits—given a contingent fee paid directly to the representative by the government, especially where that fee is wholly contingent on the claimant's win.

With all respect to Professor Pierce, administrative law judges in federal service constitute a highly trained professional cadre of dedicated individuals whose qualifications rival and in many cases exceed those appointed to the federal bench. Administrative law judges do not promulgate rules and regulations; they are charged to apply the law to adjudicate disputes. It is the Social Security Act itself and the outdated jurisprudence underlying the current hearings and appeals system that demand change—change that must be a result of both agency and congressional initiative. R

READINGS

- "Recommendations for a New Independent Adjudication Agency to Make the Final Administrative Adjudications of Social Security Act Benefits Claims," by Robin Artz. *Journal of the National Association of Administrative Law Judiciary*, Vol. 23 (Fall 2003).
- "The Social Security Administration Versus the Lawyers ... and Poor People Too," Parts I and II, by Robert M. Viles. *Mississippi Law Journal*, Vols. 39–40 (1968).
- "The Times They Are a Changin': A New Jurisprudence for Social Security," by Jeffrey S. Wolfe. *Journal of the National Association of Administrative Law Judiciary*, Vol. 29 (Fall 2009).

Reply

BY RICHARD J. PIERCE, JR. *George Washington University*

Judges Jeffrey Wolfe and Dale Glendening have made a major contribution to the debate over the Social Security disability decisionmaking process in their response to my Fall 2011 article "What Should We Do about Social Security Disability?" in which I urged major changes to that process. Their description of the history of the process and their detailed description of the manner in which it functions today will be valuable in identifying constructive changes in the process.

The judges and I agree on two important points:

- The decisionmaking process has evolved in ways that have created an unsustainably generous disability program.
- We need to engage in a "top-to-bottom" review of the process to identify needed changes.

The judges describe a decisionmaking process in which applicants for disability benefits have the opportunity to obtain a "yes" decision at any of five stages in the process: the initial decision by a state agency, reconsideration by a state agency, decision by an administrative law judge (ALJ), decision by a district court, and decision by a circuit court of appeals. Each stage in the process is characterized by two asymmetries that create systemic bias in favor of applicants:

- The applicant can appeal a "no" decision to the next level, while the government cannot appeal a "yes" decision.
- Some 80 percent of applicants are represented by attorneys, while the government is never represented by an attorney unless it goes to district court.

We differ with respect to our proposed ways of addressing the problem, however. I urge elimination of the ALJ stage of the decisionmaking process. In the alternative, I urge reinstitution of the ALJ quality-control programs the Social Security Administration implemented in the 1970s.

Important "coercion" | The judges acknowledge that elimination of the ALJ stage of the decisionmaking process would "solve" the problem, in the sense of reducing significantly the number of decisions that grant benefits. But they argue that the cost of such a change would include an undue sacrifice of our values. They object to my proposal to reinstate the ALJ

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quality-control programs on the basis that those programs interfere with the independence of ALJs. They ask, "Does any reasonable, fair-minded person sincerely believe that potentially subjecting every ALJ to discipline or removal for decisions for which there is not an 'adequate explanation' is not coercion per se?"

I am one of the many "reasonable, fair-minded" people who believe that the kind of "coercion" created by the ALJ quality-control programs of the 1970s is essential to further our values. Decisionmaking by SSA ALJs is a classic illustration of a recurring problem. We sometimes encounter conflicts between two goals of due process. The first goal is to provide every litigant an opportunity to obtain a decision from an independent judicial mind. The second goal is to construct a decisionmaking process in which like cases are resolved in like manner. When we have encountered this conflict in the past, we have often chosen to allow the pursuit of the second goal to trump pursuit of the first.

The first goal is to provide every litigant an opportunity to obtain a decision from an independent judicial mind. The second goal is to construct a decisionmaking process in which like cases are resolved in like manner.

Thus, for instance, in 1984 Congress decided that there was an intolerable degree of variation among federal judges in the sentences they were giving to defendants who were convicted of similar crimes in similar circumstances. Congress responded by creating the Sentencing Commission, an agency that is empowered to issue rules that bind judges in the sentencing context. Several district courts and circuit courts held that the commission was unconstitutional because it interfered with the independent decisionmaking power of federal judges. The Supreme Court upheld the statute, however, on the basis that the statute's interference with the independent decisionmaking power of federal judges was justified by the need to assure that like cases are resolved in like manner.

A second example is familiar to all law professors. Over the last 50 years, almost every law school has adopted a binding grading curve applicable to first-year classes. Before schools took this step, it was common for first-year students to be assigned randomly to one of two sections of a required course, where one professor regularly gave 70 percent "A" grades while the other regularly gave 30 percent "A" grades. I have taught at several schools at the time they made this change. There were always professors who objected on the basis that a binding, institutionally prescribed grading curve interfered with their academic freedom to base grades on an independent evaluation of each student's performance. In every case, however, the argument that carried the day was the argument that it was fundamentally unfair to students to subject them to "independent" decisionmakers who varied significantly in their patterns of decisions. I am delighted to be "coerced" to adopt grading norms that coincide with those of my colleagues, knowing that the coercion is essential to creating an environment that is fair to students.

The enormous variation in the patterns of decisions of SSA ALJs makes this another context that is an ideal candidate for allowing the goal of obtaining like decisions in like cases to trump the goal of providing every litigant with access to an independent judicial mind.

Other reform ideas | I am open to alternative means of addressing what the judges and I agree are serious problems in the Social Security decisionmaking process, but the changes they urge would not even move us in the right direction. First, they urge that we eliminate the obvious imbalance between the lawyer-represented applicant and the unrepresented government by assigning an attorney to represent the SSA in each case that is heard by an ALJ. As I pointed out in my article, this "solution" has a fatal cost: it would increase significantly the time required to hear each case. In order to avoid adding to the already long delay to get a hearing, the SSA would have to add many ALJs and many staff attorneys. Thus, for instance, if the conversion of ALJ hearings from *ex parte* proceedings to full adversarial proceedings tripled the average time required for each hearing, the SSA would need to hire an additional 3,000 ALJs and 4,500 staff attorneys to avoid adding more delay to the decisionmaking process. I do not believe that such a massive increase in staffing could be justified by the potential beneficial effects of such a change or that Congress could be persuaded to increase appropriations to the SSA to the extent needed to implement such a change.

Second, Wolfe and Glendening urge an expanded role for ALJs, creating "an independent corps of ALJs" who would "review administrative decisionmaking in the executive branch." In addition to the well-documented policy-based disadvantages of such a system, it would violate both the Appointments Clause and the Take Care Clause of the U.S. Constitution. Any ALJ who has the power to make final decisions is an "Officer of the United States" who can only be appointed through the process of nomination by the president and confirmation by the Senate, as the D.C. Circuit concluded in its 2000 opinions in *Landry v. FDIC*. Moreover, no officer of the United States can be insulated from presidential control by two or more layers of for-cause limits on the president's removal power, as the Supreme Court held in its 2010 opinion in *Free Enterprise Fund v. Public Company Accounting Oversight Board*. Implementation of the judges' proposal to create an independent ALJ corps would violate both of those constitutional commands. R