

October 18, 2016

John W. R. Phillips, Ph.D.  
Associate Commissioner  
Office of Research, Evaluation, and Statistics  
Social Security Administration  
500 E Street, SW  
ITC Building Room 828  
Washington, DC 20254

**RE: “The Role of Attorneys in the Disability Determination Process” Research**

Dear Dr. Phillips:

Thanks so much to you and your team for taking the time on September 27<sup>th</sup> to meet with co-chairs of the Consortium for Citizens with Disabilities' Social Security Task Force to listen to our concerns about the research summary entitled “The Role of Attorneys in the Disability Determination Process,” presented at the Disability Research Consortium’s August meeting. This letter is submitted by the undersigned co-chairs on behalf of the Social Security Task Force.

First, we appreciate SSA's attention to this important topic. The role of representation in the Social Security disability determination process is certainly under-studied. Many of us have repeatedly asked SSA to collect and publish more data related to representation. We agree with the research summary's statement that “[a]n effective representative can help the applicant construct the strongest possible case, ensure that relevant supporting evidence is provided in a timely fashion, and increase the applicant’s odds of receiving a disability award in less time.” When claimants receive benefits at the initial level, they have quicker access to financial stability and public medical insurance than if they are awarded benefits at the reconsideration, Administrative Law Judge hearing, Appeals Council, or federal court level. Avoiding unnecessary appeals is also cost-effective and efficient for SSA.

However, as we discussed, we have several concerns about the methodology and initial conclusions presented in the research summary at the Disability Research Consortium. We outline our concerns and recommendations below, and ask that this feedback be incorporated as the research is refined and paper(s) are developed for publication. We would welcome the opportunity to discuss the concerns outlined below.

**Introduction**

***“The Social Security Advisory Board (2012) heard a number of troubling allegations about attorneys....Exploring these allegations, we investigate the impact of claimants’ representatives”***

Claimants’ representatives can be attorneys or non-attorneys, professional or non-professional, and fee-charging or non-fee-charging. The research summary does not explain which group or groups it attempts to study, and Mr. Strand’s presentation indicated that the researchers were unable to separate cases based on these criteria. We urge the researchers to not use the terms “attorney” and “representative”

interchangeably and instead to distinguish between a professional representative and a family member or friend who is trying to help but must be appointed as a representative in order to do so. We also urge a better explanation of who is considered a representative for the purposes of this research, and which data sources the authors used to obtain this information.

If, as the research summary posits, “the way in which representatives are compensated for their services may create perverse incentives on the margin,” these incentives would only be obvious if fee-charging representatives were studied separately from non-fee-charging representatives. Since the research was unable to do so, we urge that the authors be clear that they cannot make conclusions about the effect of the representative fee structure on initial disability claims.

In addition, the research summary attributes to the Social Security Advisory Board’s (SSAB’s) 2012 paper the allegation that “some attorneys appear to deliberately slow down cases, filing incomplete and less fully developed applications and failing to respond to request, all for the apparent purpose of delaying the case long enough to maximize the applicant’s back pay – and their fee.” Omitted from the summary is another finding from the 2012 SSAB paper – that despite the allegations the SSAB researchers heard, SSA’s Office of General Counsel (OGC) reports that it rarely receives referrals of this type of misconduct.

In the slide presentation for the Disability Research Consortium, establishing a protective filing date to ensure the largest possible back payment for the claimant is described as a “perverse incentive.” But there is nothing perverse about making sure a claimant receives all the benefits to which he or she is entitled: representatives who help claimants obtain protected filing dates while gathering evidence are upholding their ethical responsibilities to their clients. Further, the SSAB report does not suggest that doing so is problematic. The SSAB paper accurately states:

Often, representatives file the claim with SSA while they are still in the process of gathering information. The immediate filing acts to protect the claimant’s initial filing date so that payment to the claimant will be based on the date the application is filed, not when the application is completed. If the claim is completed within the required filing period and the claim is ultimately allowed, the claimant may be due retroactive payments. For representatives, having a protected filing period gives them time to gather employment history and related information, collect medical evidence, and even arrange for medical testing while at the same time protecting their client’s rights to the maximum possible benefit. From the point of view of the agency, an incomplete filing increases the work load of the field office employees who have to follow up on incomplete applications and assist claimants to complete them. Also, these incomplete applications only delay the decision for the claimant because until the application is complete, the field office cannot send it to the DDS to begin the process of making a medical determination. During visits with both SSA employees and third party representatives, the incomplete applications were repeatedly identified as a source of friction between the groups.

The SSAB paper noted that the representatives’ efforts to protect their clients’ rights to the maximum possible benefit by filing an incomplete application increases the work load of field office employees from the agency’s point of view. There is nothing that indicates that obtaining a protective filing date is done for the purpose of maximizing fees as opposed to ensuring that claimants receive all the back pay to which they are entitled. The friction described in the SSAB paper is not over whether the representative has a responsibility to protect their clients’ rights to benefits they have earned; rather, it is the tension between preserving those rights and adding to the workload of field office staff who already are overwhelmed due to chronic underfunding of SSA’s administrative expenses by Congress.

***“The average fee payment in 2015 was \$2939”***

As the reference indicates, this is the average fee in Title II cases. The average fee in all cases, including SSI-only claims, is likely much lower.<sup>1</sup> In addition, this average includes all Title II fees, many of which were paid after an ALJ hearing (and often after the Appeals Council and/or a federal court considered the case and either remanded it for another hearing or awarded benefits). In research that only addresses representation at the initial application stage, it would be more appropriate to provide the average fee paid when the award of benefits was made at the initial level. If this information is not available, a further explanation of this average fee amount would be less misleading and would help avoid reader confusion.

Finally, the research summary presents data for the time period from 2010 to 2014. It would be more accurate to present fee payment data from the study period, which is available on the same web site the paper cited for 2015 data. The average fee payment during the entire study period was slightly higher than the 2015 amount, at \$3052, but it declined over the study period. Presenting the 2014 data, as the research summary did for its other findings, would have showed an average fee payment of \$2867.

**Findings**

***“In 2014, representation leads to 9 additional days in field office processing time....Cases with attorney representation also exhibit longer DDS processing times, though at 2.9 days on a mean of 92 days, the effects are much smaller.”***

The study period was five years long: 2010 to 2014, inclusive. However, the research summary only discusses the 2014 figures, which show the smallest favorable effect of representation on award rate and the largest effect in processing time.<sup>2</sup> Focusing on only one year, and choosing to highlight the year that happens to best support the researchers’ hypothesis, reduces the credibility of the findings.

The research summary neglects to mention that the act of appointing a representative itself takes time. At meetings with advocates, Acting Commissioner Colvin and her staff have stated that field offices’ largest unprocessed paper workload is SSA-1696 (Appointment of Representative) forms. Representatives who submit 1696s to field offices often need to call the field office multiple times before SSA staff enter the representative’s information on the client’s claim. SSA field office staff frequently ask representatives to re-submit 1696s multiple times, which adds to the unprocessed workload. Staff at state DDS agencies generally will not talk with representatives until SSA field office staff have processed 1696s. This means that representatives who want to learn whether the state agency has obtained certain medical evidence or request that the claimant be sent for a consultative examination are delayed in doing so. We urge the researchers to examine and consider how long it

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<sup>1</sup> It is also worth noting that in recent years there appears to be an increase in partially favorable decisions, at least at the ALJ level (the only level at which SSA publishes information distinguishing partially and fully favorable decisions). Claims that result in partially favorable decisions may result in small or no representative fees.

<sup>2</sup> See Mr. Strand’s slides 27-9. Award rates declined and processing times increased for all claimants during this time period.

takes the average field office to process a 1696 submitted on an initial-level claim<sup>3</sup> and whether field offices that take longer to process 1696s see a greater effect of delays in processing time in cases with representation.

In addition, the research summary does not address when in the initial application process representatives were appointed. In many cases, claimants apply for benefits and then hire representatives, often once the case has left the field office and is at the state agency. In these situations, one would not expect representation to affect the time it takes a claim to be sent from a field office to a state agency.<sup>4</sup> If the researchers are able to refine their research to consider more precisely when a representative is appointed, it would be helpful to consider the difference between the date the 1696 was submitted to the field office versus the date on which it was processed; as described above, SSA often experiences significant delays in processing 1696s.

A similar issue relates to the time that SSA takes to obtain a claimant's prior file. Such activity takes SSA time and likely adds to overall processing time. Having a prior denial means that there is a prior claims file, and claimants with representatives are substantially more likely to have a prior denial than unrepresented claimants are. Of the numerous factors studied, a prior denial is the most highly correlated with obtaining a representative. The time it takes SSA to locate a prior claims file and associate it with the current file contributes to the disparity between represented and unrepresented claimants. Adding to this disparity is the fact that SSA does not always associate the prior file as it should.<sup>5</sup> Claimant's representatives are more likely to push SSA to locate and review prior files than an unrepresented claimant would be. Although this might increase processing times, it is likely among the factors that helps represented claimants obtain favorable decisions.

The research summary does not explain whether "field office processing time" begins with the claimant's protected filing date, the date an application is completed, or some other date. If the field office "delay" is simply a measure of representatives assisting their clients in obtaining protective filing dates,<sup>6</sup> then, as described above, this only benefits claimants and should not be presented as a negative outcome.

Similarly, the research summary does not explain whether "field office processing time" includes time that claims are at the field office after the state agency issues a decision. Cases with representatives could take slightly longer to process after state agency decisions simply because two notices must be sent: one to the claimant and one to the representative. Additionally, field offices will likely take longer to process awards of benefits than denials, for reasons outside the control of the claimant or

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<sup>3</sup> It should be noted that beginning in March 2015, SSA has allowed representatives to submit 1696s as attachments to "iAppeals." This is useful for some cases at the reconsideration and ALJ level, but is not available at the initial level. Information from 1696s submitted electronically must still be input by SSA staff.

<sup>4</sup> This may be one of the reasons that the estimate of how representation affects field office processing time has an R-squared value of just 0.03 to 0.05, depending on the year studied.

<sup>5</sup> See, e.g., <http://www.empirejustice.org/issue-areas/disability-benefits/ssi-ssd/ssa-issues/is-ssa-obligated-to-obtain.html>. As the article notes, obtaining a prior claim file can help determine whether a prior claim should be reopened. Reopening such claims could raise the retroactive benefits available to the claimant and allow an earlier entitlement to Medicare or Medicaid. It would also increase the fee payable to a representative who charged for his or her services.

<sup>6</sup> For example, by helping clients call to make appointments for in-person SSI applications rather than having the claimant walk in for an unscheduled visit to a field office, or by insisting that SSA follow its own policies for protecting filing dates.

representative. Denials merely require a form notice; awards require the calculation of benefits, review of all non-medical eligibility factors,<sup>7</sup> development of the need for a representative payee, and other time-consuming steps. The field office must take additional measures in cases where a representative charges a fee. The research should control for the fact that awards are more common in cases with a representative.

The fact that cases with representation are more likely to be successful could also affect processing times at the state agency level. One reason for this is that SSA is required to review at least half of favorable decisions issued by state agencies<sup>8</sup> but reviews very few unfavorable decisions. Reviews take less than 30 days in most cases, but can sometimes take longer; if a reviewed case is returned to the state agency, the state agency has 30 more days to revisit its determination.<sup>9</sup> Therefore, a set of cases that has more awards (for example, the set of cases with representatives) is naturally going to show longer processing times.<sup>10</sup> The research summary does not address this issue, which could be even more significant if the cases subject to quality review where a representative was present were more likely to be sent back to the state agency for additional analysis.

Another consideration is whether cases that result in an award of benefits are different in certain ways from cases that result in denials—for example, do the files of “winning” cases have more medical records, resulting in a need for state agency workers to spend more time reading them? Do claimants in winning cases see more medical providers, requiring state agencies or representatives to contact more sources to obtain medical evidence? Are claimants in winning cases more difficult or time-consuming to contact, perhaps due to poverty, frequent hospitalizations, cognitive or language limitations, or the fact that they have more information to convey about their impairments? If any of these are the case, then it would be expected that the cohort of claims with representatives would take longer than the cohort of unrepresented claims, simply because the set of represented claims contained a larger percentage of cases where the state agency issued a favorable decision than the set of unrepresented claims did.

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<sup>7</sup> These can include immigration status, marital status, insured status, assets, living arrangement, earnings, unearned and in-kind income, presence of certain types of criminal warrants, eligibility of auxiliary beneficiaries, workers’ compensation offsets, etc. Some of these factors exist only for Title II or SSI claims, and some are required to establish eligibility for both programs.

<sup>8</sup> See <https://www.ssa.gov/legislation/PER%20fy12.pdf> and <https://www.ssa.gov/chicago/aian/oqp.html> (“All DQB reviews are conducted on live cases; in other words, these are cases where a medical decision has not been finalized and payments have not yet been issued. Therefore, it is important that we make every effort to move these cases as quickly as possible through our review process”)

<sup>9</sup> <https://www.ssa.gov/chicago/aian/oqp.html#&ht=1>

<sup>10</sup> If 51.3% of cases with favorable decisions (the FY 2012 figure from <https://www.ssa.gov/legislation/PER%20fy12.pdf>) and 1.41% of denials (an estimate based on the number of targeted denial reviews in 2014 stated in [https://www.ssa.gov/agency/performance/2016/FINAL\\_2014\\_2016\\_APR\\_508\\_compliant.pdf](https://www.ssa.gov/agency/performance/2016/FINAL_2014_2016_APR_508_compliant.pdf) and FY 2014 “waterfall chart” data on the number of initial denials) received quality reviews, and cases with representatives had a 36.2% award rate compared with 35% of unrepresented cases, then 19.47% of represented claims and 18.87% of unrepresented cases would be reviewed. If we assume that means 19% of all cases are reviewed and that those that are reviewed have an average state agency processing time of 122 days, while those that are not reviewed take 85 days at the state agency (this results in an average processing time of 92.03 days, consistent with the paper’s findings), then the average processing time for represented cases is  $(122 \cdot .1947) + (85 \cdot .8053)$ , or 92.204 days. The average processing time for unrepresented cases is  $(122 \cdot .1887) + (85 \cdot .8113)$ , or 91.982 days. Although these figures are extremely rough, they show that almost 8% of the difference in processing time between represented and unrepresented cases is simply an interaction between the higher award rate in represented cases and SSA’s quality review processes.

***“A frequent allegation made against attorneys is that they intentionally delay cases to maximize the amount of their fee payment (and, along the way, increase agency costs)...the data is consistent with this claim.”***

The data show nothing about intentionality and to state otherwise is misleading. All professional representatives have an ethical responsibility to ensure that their clients’ cases are properly developed and processed, and could be sanctioned for intentionally delaying cases. As previously noted, OGC rarely receives complaints of this type of misconduct.

It is important to note that a delay of 4.7 to 11.9 days (the average amounts found in each year of the study interval) would usually not increase a representative’s fees. Fees are based on a claimant’s retroactive benefits, which increase monthly. If a claimant who would have been awarded benefits on August 5 is instead awarded them on August 17, there is no increase in retroactive benefits and the representative’s fee is the same.<sup>11</sup>

Additionally, as noted earlier, the research currently groups representatives who charge fees together with those who do not. Certainly, representatives who waive fees would have no incentive to maximize the amount of their (non-existent) fee payments.<sup>12</sup>

Even among representatives who charge fees, there are significant incentives to obtain an award of benefits as quickly as possible. Prompt dispositions allow representatives to be paid sooner and to take on additional clients. Clients who receive awards in a timely fashion are probably less likely to fire their representative while they are waiting for a disposition and more likely to give favorable recommendations to other potential clients, allowing the representative to enjoy positive reputational effects.

Furthermore, if the additional processing time allows a claimant to receive an award at the initial level, rather than needing to request reconsideration and/or an ALJ hearing, that is time well spent for both the claimant and the agency. Claimants who obtain an award at the reconsideration, ALJ hearing, Appeals Council, or federal court level instead of the initial level will wait additional months or years before they begin receiving benefits;<sup>13</sup> receipt of Medicare and/or Medicaid may be similarly delayed.

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<sup>11</sup> In the unusual situations where a delay did lead to another month’s benefits, the fee would increase by an average of \$283 for a Title II disabled worker claim and \$134 for an SSI disabled adult claim, based on December 2012 (roughly the midpoint of the study period) benefit amounts. See [https://www.ssa.gov/policy/docs/quickfacts/stat\\_snapshot/2012-12.html](https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/2012-12.html). When this small increase is compared with the risk of upsetting the claimant, having a denial issued before evidence is submitted, or not being able to take on an additional case, this appears to be a risky strategy that rational representatives would avoid.

<sup>12</sup> There are numerous models for initial-level representation and many types of claimants who obtain representation at this stage. Reviews of SOAR and other models providing initial-level, non-attorney support to homeless individuals with severe mental illness have not indicated a delay in processing times, though they have used different methodologies. See <https://aspe.hhs.gov/legacy-page/findings-study-ssisdi-outreach-access-and-recovery-soar-initiative-main-page-142291#IIIB> and <https://www.ssa.gov/policy/docs/ssb/v76n1/v76n1p1.html>.

<sup>13</sup> The average processing time for reconsiderations in Fiscal Year (FY) 2015 was 113 days. <https://www.ssa.gov/budget/FY17Files/2017APP.pdf>, p.26. In “prototype” states (see <https://secure.ssa.gov/poms.nsf/lnx/0412015100>) there is no reconsideration stage: claimants denied at the initial level must request ALJ hearings. The average processing time for an ALJ hearing at the end of FY 2015 was 480

Finally, it is worth noting that agency costs do not go up when a representative receives a larger fee; fees are paid out of a claimant's past-due benefits and the amount of the fee should not affect SSA's costs.<sup>14</sup> Claims that take longer to process at the initial level could be more expensive for SSA, but the paper presents no evidence of this. There is reason to think that even if cases with representatives take slightly longer, they are cost-neutral to the agency, or may even save SSA money in the long run. When representatives need time to obtain and submit additional medical records, the state agency can process other claims while waiting, and it can spend less time and money making and following up on records requests for the represented claimant. By obtaining medical records and medical source statements from treating providers, representation may reduce SSA's need to pay for consultative examinations. And if representative-submitted evidence results in a favorable decision, SSA is spared the costs associated with processing an appeal as well.

***“Cases with representation are more likely to result in a denial for ‘insufficient evidence.’”***

In addition to this statement in the summary, Mr. Strand's presentation also said that cases with representation are more likely to result in a denial for failure to attend a consultative examination. The research summary and presentation did not list the other categories for denials, explain how much they decreased,<sup>15</sup> or discuss whether those decreases were statistically significant. In the situation of failure to attend a consultative examination, it is not clear whether the representative was appointed before or after the examination was scheduled or whether an appointed representative received proper notice of the examination.

Furthermore, there is no evidence presented to indicate that cases denied for “insufficient evidence” actually have less, or insufficient, evidence—or that certain types of denials are more problematic than others. There was no comparison of the length of case files or the number of medical providers who supplied evidence in claims denied for insufficient evidence versus other types of denials, or versus claims that resulted in awards. There is also no discussion of how “insufficient evidence” denials fare on appeal: whether and how much additional evidence is added, how that compares to claims denied for other reasons, and whether they differ on award rate at the reconsideration, ALJ hearing, or other level.

***“We interpret the QUICK score as indicating differences in how fully documented the claim is when it arrives at the DDS....Cases with attorney representation are less fully documented upon receipt at DDS”***

We caution against the use of QUICK scores as a measure of how well a claim is documented when it arrives at the state agency, for the reasons discussed in the paper: “it is not known whether the QDD propensity score components provide meaningful information away from the allowance margins that

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days (<https://www.ssa.gov/budget/FY17Files/2017APP.pdf>, p.26); by September 2016 hearing-level processing time had risen to 587 days.

<sup>14</sup> Representatives whose fees are remitted to them by SSA itself (instead of obtaining the fee from the beneficiary) pay a “user fee” of 6.3% of the fee, with a current maximum user fee of \$91. See 81 Fed. Reg. 290 (January 5, 2016). The user fee maximum is reached when the claimant's retroactive benefits are more than \$5777, and it is likely that many claimants who are awarded benefits at the initial level have much smaller amounts of retroactive benefits. Therefore, representatives at the initial level pay a user fee that increases along with their fees.

<sup>15</sup> Given the findings presented, some denial categories must have decreased.

the score was designed to measure.” This is especially true because SSA does not publish a list of the factors that go into the QUICK score model.

As discussed above, representatives often enter a case once it is already at the state agency: the presence of a representative at the time of the initial decision does not indicate that the representative did or could play any role in the case before it was sent to DDS. Claimants who file a claim and plan to subsequently obtain representation could be expected to do less work developing their own claims, expecting the representative to do this work once the case is at the DDS. The research summary does not address this issue.

We would also note that development of the case when it arrives at the state agency is much less important than how developed the case is (perhaps measured by length of file, presence of medical source statements from treating providers, or number of medical sources whose records are included in the file) when the state agency issues a decision. Representatives who submit medical evidence while the case is at the state agency perform a valuable service by lessening the workload of state agency employees, decreasing the need for consultative examinations, and allowing the state agency to make more informed determinations.

### **Recommendations for Additional Analysis**

The research summary does not address whether representation affects medical versus non-medical (also known as “technical”) denials. Technical denials require different appellate strategies,<sup>16</sup> and avoiding these denials requires the claimant to meet non-medical eligibility requirements and provide appropriate documentation when necessary. Some technical denials occur after the state agency has already made a disability determination, which is inefficient and costly for SSA. It would be useful to know whether representation has a different effect on technical versus medical denials.

When studying correlates of representation, it is likely that several of the correlates are themselves probably highly correlated with having a prior denial. It would be useful to consider the group of claimants with prior denials separately from those who are applying for the first time and see what the effect of representation is on each group. In the group that has been denied before, one potential benefit of representation is that the claimant would receive advice on the pros and cons of appealing a denial rather than reapplying for benefits.

Mr. Strand’s presentation<sup>17</sup> noted that as the percentage of cases at the initial level with representatives increased from 2010 to 2014, so did overall processing time for initial disability claims. This correlation does not indicate causation: if any causal relationship existed, it is likely the reverse of Mr. Strand’s hypothesis, as claimants sought representation to help them cope with the increasingly understaffed and overworked agency. SSA’s administrative budget declined during this time period, and its workloads

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<sup>16</sup> For example, appeals of technical denials cannot be made electronically but instead require paper appeals. Those appealing technical denials may need to supply different types of evidence: pay stubs or other information from employers, immigration documentation, marriage licenses, etc. Some cases are not returned to the state agency for additional review of medical evidence.

<sup>17</sup> At Slide 23

increased.<sup>18</sup> Field office closures also led to declines on several measures of customer service.<sup>19</sup> It would be useful to decompose the increase in processing time to see how much is actually a result of SSA's budgetary shortfalls.

The research summary only addresses Title II cases, not SSI or concurrent claims. It would be useful to know whether the effects of representation are different in different types of cases, especially given that some state and local governments, hospitals, and other entities have special programs to offer representation to potential SSI recipients in order to create savings on medical expenses and other need-based financial assistance programs.

Most importantly, additional research is needed on the effect of representation at the ALJ hearing, Appeals Council, and federal court level, where it is most prevalent. SSA should consider publishing more data about representation, with robust metadata and description of its methodology.

### Conclusion

Thank you for taking the time to listen to our concerns about this research. We hope that you will find it helpful, and we look forward to further discussion. If you would like to set up a meeting, either in person or by phone, please contact Stacy Cloyd, [stacy.cloyd@nosscr.org](mailto:stacy.cloyd@nosscr.org) or (202) 457-7775.

Sincerely,

Lisa Ekman, National Organization of Social Security Claimants' Representatives  
Kate Lang, Justice in Aging  
Jeanne Morin, National Association of Disability Representatives  
T.J. Sutcliffe, The Arc of the United States

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<sup>18</sup> See <http://www.cbpp.org/research/retirement-security/budget-cuts-squeeze-social-security-administration-even-as-workloads>. The number of initial disability applications peaked in FY 2011; most of the increase in workload at SSA came from a growing number of retirement and survivors' claims.

<sup>19</sup> Manasi Deshpande's work, presented on the same DRC panel as this paper, showed that wait times increased and other productivity measures declined after SSA closed field offices.