**National Organization of**

**Social Security Claimants' Representatives**

**(NOSSCR)**

**560 Sylvan Avenue • Englewood Cliffs, NJ 07632**

**Telephone: (201) 567- 4228 • Fax:** **(201) 567-1542 • email: nosscr@nosscr.org**

***Executive Director***

**Barbara Silverstone**

August 14, 2015

David Marcus

Professor of Law

University of Arizona Rogers College of Law

1201 E. Speedway Boulevard

Tucson, AZ 85721

Jonah Gelbach

Associate Professor of Law

University of Pennsylvania Law School  
3501 Sansom Street  
Philadelphia, PA 19104-6204

Re: NOSSCR comments to ACUS study of Social Security disability litigation in the federal courts

Dear Professor Marcus and Professor Gelbach:

Thank you for the opportunity to submit comments on the ACUS study of Social Security disability litigation in the federal courts. As an initial clarification, we want to state that the comments and in this document reflect the opinions of the NOSSCR staff and not of our individual members. For many years, NOSSCR has taken positions on many of the questions you have asked. However, NOSSCR staff does not represent individual claimants and beneficiaries in federal court, although some of our responses have been informed by representing individuals while working for other organizations.

To provide background about our organization, NOSSCR was founded in 1979 and is a professional association of attorneys and other advocates who represent individuals seeking Social Security disability and Supplemental Security Income (SSI) disability benefits. NOSSCR members represent these individuals at all Social Security Administration (SSA) administrative levels and federal court levels. We are a national organization with a current membership of more than 3,500 members from the private and public sectors and are committed to the highest quality legal representation for claimants.

**INTRODUCTION**

Our comments focus on the impact of the ACUS study on the millions of claimants and beneficiaries with severe disabilities for whom Title II and SSI cash benefits, along with the related Medicaid and Medicare benefits, are the means of survival.

We support the current system of judicial review and believe that both individual claimants and the system as a whole benefit from the federal courts deciding Social Security cases. Over the years, the federal courts have played a critical role in protecting the rights of claimants. The system is well-served by regular, and not specialized, federal judges who hear a wide variety of federal cases and have a broad background against which to measure the reasonableness of SSA’s practices.

Creation of either a single Social Security Court or Social Security Court of Appeals or otherwise restricting federal court appeals would limit the access of people with disabilities and elderly persons to judicial review. Under the current system, the federal district courts are more geographically accessible to all individuals and give them an equal opportunity to be heard by judges of high caliber.

Rather than creating different policies, the courts, and in particular the circuit courts and the United States Supreme Court, have contributed to national uniformity, e.g., termination of disability benefits, denial of benefits to persons with mental impairments, rules for the weight to give medical evidence, evaluation of pain. The courts have played an important role in determining the final direction of important national standards, providing a more thorough and thoughtful consideration of the issues than if a single court had passed on each. As a result, both Congress and SSA have been able to rely upon the court precedent to produce a reasoned final product.

Instead of focusing on the back end of the process, i.e., federal court appeals, a more appropriate remedy for the serious problems facing claimants today should focus on making changes where they are most needed – at the beginning of the process. Forcing people with serious disabilities to pursue an appeal in order to obtain justice does not achieve a goal of ensuring that they receive the benefits to which they are entitled.

It is important to note that the clear majority of claimants denied at the initial level do not pursue an appeal. In Fiscal Year (FY) 2014, roughly speaking, less than 30% of initial denials were appealed to the reconsideration level. We believe that many of the claimants who do not appeal are as disabled as those who do appeal and are ultimately found disabled. Why? There are a number of factors beyond their control in many cases – key evidence was not obtained, treating sources are not told what information is relevant, claimants are too ill to pursue an appeal, or perhaps receiving a letter from the United States Government stating that “you are not disabled” discourages them from appealing the denial.

NOSSCR has consistently urged policymakers to focus on the front end of the process so that appeals – whether to Administrative Law Judges (ALJs), the Appeals Council, or federal court – are not necessary. We discuss our recommendations at pages 13-17.

**I. LOCAL RULES AND INDIVIDUAL PRACTICES**

**NOSSCR’s COMMENTS:** Many of these questions require experience with federal court litigation, and in particular, litigation in more than one federal judicial district. Because NOSSCR staff does not represent individual clients, we do not have comments for many of these questions. We have included responses to those questions where we do have comments.

However, upon your request, we would be able to provide contact information for NOSSCR members who have large federal court practices, including some with extensive multi-district litigation experience.

1. **Does NOSSCR believe that variations in local rules and individual practices pose problems for the efficient and accurate resolution of social security appeals? If so, what sorts of problems do variations cause?**

**What are NOSSCR’s views on the importance of uniformity in the rules and orders that govern disability litigation?**

**NOSSCR COMMENTS:** We have no comments to this question.

1. **What local rules or individual practices does NOSSCR believe work particularly well for disability litigation? What rules or practices do not work well for disability litigation?**

**NOSSCR COMMENTS:** We have no comments to this question.

1. **The following questions solicit NOSSCR’s views on several rules and possible rules.**

**NOSSCR COMMENTS:**

While we do not have responses to the specific suggestions mentioned below, we do believe it is important that claimants who appeal to federal court are not treated as “second class citizens.” The examples mentioned below would make the process for Social Security disability plaintiffs quite dissimilar from that provided to other litigants. For example, the general practice is that an appellant’s brief is filed first. How would limiting the length of a brief regardless of the complexity of the case affect a case that is unusually complicated, presents novel issues, or is a class action? And if a court’s discretion in holding oral argument is limited except in “unusual circumstances,” who decides what is “unusual”? What does “unusual” mean? What criteria would be considered to decide “unusual”? And it must be recognized that all appeals do not involve disability issues. How would non-disability Social Security cases be handled? Or class actions?

* 1. In some districts a local rule requires the SSA to file the first merits brief, followed by the plaintiff’s response. In most districts, the local rule requires the plaintiff to file the first merits brief, followed by the SSA’s response. Which rule does NOSSCR prefer and why?
  2. Many districts have page or word limits for merits briefs in disability litigation. What are NOSSCR’s views on a possible rule that would limit initial and responsive briefs to 7,000 words and reply briefs to 3,000 words?
  3. What are NOSSCR’s views on a possible rule replacing the complaint with a petition for review modeled on Form 3 of the Federal Rules of Appellate Procedure? (For Form 3, see http://www.uscourts.gov/rules-policies/current-rules-practice-procedure/appellate-rules-forms)
  4. What are NOSSCR’s views on a possible rule that would permit the SSA to file the certified administrative record in lieu of an answer?
  5. Local rules in some districts require the parties to file a joint statement of facts. What are NOSSCR’s views on this rule?
  6. What are NOSSCR’s views on a possible rule providing that the court will not hold oral argument except in unusual circumstances?
  7. What are NOSSCR’s views on a possible rule that would give each party one extension as of right, provided that the party requested an extension at least twenty-four hours in advance of a briefing deadline?

**II. OTHER ASPECTS OF FEDERAL LITIGATION**

1. **From NOSSCR’s perspective, what are the most significant differences in the case law of the various U.S. Courts of Appeals?**

**NOSSCR COMMENTS:**

• **The important role of circuit courts**

One area of difference between the circuit courts is discussed below – whether evidence submitted to the Appeals Council will be considered part of the administrative record in court. However, first we think it is important to note the important role of the circuit courts. Intervention by the circuit courts has played and continues to play a vital role in protecting the rights of claimants. The courts have halted illegal practices by SSA and have provided standards and guidance when the agency failed to articulate clear policies. This vital role was especially enhanced by the process of “percolation,” whereby the circuit courts addressed issues as they arose. Through this process, a body of law developed that led to a fuller consideration of issues than if only a single court passed on each issue.

This process of review by different circuit courts has not led to significant regional variation in rules. In general, the circuit courts have reached agreement on core issues concerning the programs administered by SSA. To the extent that variation has arisen, SSA has been able to restore national uniformity through the promulgation of uniform standards. These standards have been significantly improved by the fact that they have drawn on the collective wisdom of the federal courts of appeals.

The most notable examples of how the dialogue between the circuit courts has benefitted the system and led to national uniformity occurred in the mid-1980s. The issues before the courts were the termination of benefits to tens of thousands of individuals whose conditions had not medically improved and SSA’s standard of denying benefits to persons with mental impairments without performing an individualized assessment of disability. The courts were highly critical of SSA’s actions and, one after another, held that the agency’s policies were unlawful and ordered relief for aggrieved individuals. Congress responded in both of these areas when it passed the Social Security Disability Benefits Reform Act of 1984,[[1]](#footnote-1) relying on the similarities in the numerous court decisions to develop legislation.

SSA has also benefitted from guidance provided by the circuit courts in developing uniform standards. Prior to 1991, SSA had failed to promulgate comprehensive rules for weighing medical evidence and subjective evidence in disability claims. As a result, the courts stepped in to fill the void. The circuit courts established an extensive collection of precedent in these areas.

For example, the “treating physician rule” existed in every circuit and provided fairly similar guidance. Generally, the opinion of a treating physician was to be given more weight than that of a consulting or nonexamining physician. While some variations existed from circuit to circuit, the biggest split at the time was between the circuits and the Social Security Administration (SSA).

Finally, in 1991, SSA moved to address this problem when it published final rules describing the weight to be given all medical evidence, including reports from treating physicians and consultative examinations.[[2]](#footnote-2)  The extensive circuit case law played an important role in development of the regulations. Even SSA stated that it had “been guided” by basic principles upon which the majority of circuit courts generally agreed. There principles are:

1. “[T]reating source evidence tends to have a special intrinsic value by virtue of the treating source’s relationship with the claimant.”

2. “[I]f the Secretary [now Commissioner] decides to reject such an opinion, he should provide the claimant with good reasons for doing so.”[[3]](#footnote-3)

Later in 1991, SSA addressed another area of well-established circuit precedent – the evaluation of pain in disability claims.[[4]](#footnote-4) After multiple court cases challenged the standard used by SSA to evaluate pain, the courts stepped in to fill the void caused by SSA’s failure to promulgate comprehensive rules for evaluating subjective symptoms like pain.

The circuit courts established an extensive collection of precedent in this area.[[5]](#footnote-5) Like the treating physician rule, precedent in different federal circuits shared a basic view: (1) If there is an underlying medical condition and the person’s pain is “reasonably related” to that condition, then it must be considered; and (2) If the person’s statements are found not credible, then the adjudicator must state the reasons.

The circuit case law played an important role in development of SSA’s comprehensive November 1991 regulations. By SSA’s own admission, these regulations drew from the body of case law in providing a detailed framework for evaluating subjective symptoms, including pain.[[6]](#footnote-6)

**• Current issue of circuit court difference: Whether the court will consider evidence that was not before the ALJ but was submitted first to the Appeals Council, which denies the request for review.**

Under 42 U.S.C. § 405(g), the “final decision” of the Commissioner is subject to judicial review. Where the Appeals Council “grants” review under 20 C.F.R. § 404.970(a) and § 416.1470(a), the Appeals Council decision is the “final decision.” However, in the vast majority of cases where the Appeals Council denies review, the ALJ decision is the “final decision” for purposes of judicial review.

Most cases appealed to court involve the issue whether the ALJ’s findings were supported by substantial evidence. But the circuit courts have differed on how judicial review of the ALJ decision is affected when new evidence is submitted to the Appeals Council. Submission of new evidence is clearly allowed by 20 C.F.R. § 404.970(b) and § 416.1470(b), but is this new evidence considered as part of the administrative record on judicial review when the Appeals Council denies review, leaving the ALJ decision as the “final decision” of the Commissioner?

The regulations provide that the Appeals Council “shall” consider additional evidence that is (1) new; (2) material; and (3) relates to the period on or before the ALJ decision. The Appeals Council “shall evaluate the entire record, including the new and material evidence submitted and will then grant review of the case if it finds that the ALJ’s findings “is contrary to the weight of the evidence currently of record.” *Id.* Even if evidence is not submitted to the Appeals Council but is submitted to the district court, the Social Security Act provides that the court may remand a case for consideration of new and material evidence where “good cause” exists for not including it in the record at the administrative levels. This type of remand is made under sentence 6 of 42 U.S.C. § 405(g).

Courts have differed on the issue of whether the newly submitted evidence is part of the administrative record subject to judicial review where the Appeals Council denies review. The circuit courts are split on this issue with some holding that the new evidence can be considered (Second,[[7]](#footnote-7) Fourth,[[8]](#footnote-8) Fifth,[[9]](#footnote-9) Eighth,[[10]](#footnote-10) Tenth[[11]](#footnote-11)) and the others holding that the new evidence cannot be considered by the courts unless “good cause” is shown as required by 42 U.S.C. § 405(g)(First,[[12]](#footnote-12) Third,[[13]](#footnote-13) Sixth,[[14]](#footnote-14) Seventh,[[15]](#footnote-15) Eleventh[[16]](#footnote-16)). The Ninth Circuit presents a confusing situation. It has a longstanding decision siding with the circuits that will review the new evidence[[17]](#footnote-17); however, a decision by a different panel appears to take the opposite approach.[[18]](#footnote-18)

It should be noted, however, that even in most of the cases where the courts held that judicial review included the new evidence, that evidence did not make a difference in the outcome with the courts ultimately affirming the denial of benefits.

1. **Does NOSSCR believe that federal district courts afford ALJ decisions the deference that these decisions are owed under the applicable standard of review?**

**NOSSCR COMMENTS:**

We do believe that the federal district courts afford ALJ decisions proper deference under the applicable standard of review.

We review hundreds of district court and circuit court cases involving Social Security and SSI disability claims every year, with many decisions resulting in court-ordered remands. The most frequent reason for the remands is the ALJ’s failure to articulate supported and valid reasons for rejecting or discounting medical evidence from treating sources or the ALJ’s failure to properly apply the two-step evaluation for evaluation of subjective symptoms. SSA’s regulations require that “[w]e will always give good reasons in our notice of determination or decision for the weight we give your treating source’s opinion.[[19]](#footnote-19) The regulations also require that “[w]hen evaluating the credibility of an individual’s statements, the adjudicator must consider the entire case record and give specific reasons for the weight given to the individual’s statements.”[[20]](#footnote-20)

The failure to provide a rationale leaves the court unable to adequately review the record since the court cannot determine how the ALJ weighed the evidence or why the ALJ may have rejected an opinion. As a result, the court has no choice but to remand the case for further development of the record.

1. **What are NOSSCR’s views, if any, on the differences between magistrate judges as the principal decision-makers for social security cases, either by consent or through a report-and-recommendation process, and district judges as the principal decision-makers for social security cases?**

**NOSSCR COMMENTS:**

We believe that the current process works adequately. In some districts, the U.S. District Court Judge refers the case to a U.S. Magistrate Judge for a Report and Recommendation. In other cases, the plaintiff consents to a final decision by the U.S. Magistrate Judge. The consent process allows the plaintiff, with the assistance of his/her attorney, to make the final decision. Or, if a Magistrate Judge issues a Report and Recommendation, the plaintiff can respond to the district judge with objections.

1. **In lieu of remanding an appeal to the agency for further proceedings, should federal district judges have the authority to conduct a hearing, consider evidence outside of the record, and render ultimate disability determinations themselves?**

**NOSSCR COMMENTS:** We think that the current process has worked well for decades and should remain in place. The judicial review process has established a vast collection of circuit court precedent and district court opinions based on the review authority of the federal courts under 42 U.S.C. § 405(g). Section 405(g) gives the court the authority to affirm, modify, reverse, or remand the case.

We agree with the current process, which allows the court to remand a case under limited circumstances for the Commissioner, but not the court, to consider new evidence that was not previously included in the administrative record. Under “sentence 6” of 42 U.S.C. § 405(g), the court may remand a case for additional evidence to be taken by the Commissioner, but only if the new evidence is (i) “new” and (ii) “material” and (iii) there is “good cause” for the failure to submit it in the prior administrative proceedings. Courts hold claimants to this stringent standard and remands under the second part of “sentence 6” for consideration of new evidence submitted by the claimant occur very infrequently.

The courts also have the authority to reverse cases and “render ultimate disability determinations themselves.” This happens infrequently as the vast majority of court decisions favorable to claimants are remands. The allowance rate has been 5% or less for many years (it was 2% in FY 2014 vs. 43% remand rate). Reversal, awarding benefits, may occur when the court finds an error and that the record is fully developed, with no need for further fact-finding.

1. **Agency lawyers conduct a defensibility analysis before filing their merits briefs. If the agency lawyer believes that the ALJ’s decision is not defensible, he or she can request a voluntary remand. What are NOSSCR’s views on the SSA’s requests for voluntary remands? Does the SSA request remands too often? Too rarely?**

**What are NOSSCR’s views on whether the SSA could improve the process by which it seeks a voluntary remand?**

**NOSSCR COMMENTS:**

While we have no specific opinion based on direct practice, we support the use of voluntary remands because they can speed up the process for cases that have proceeded to the court level and also relieve the court’s caseload.

However, we are concerned why the government will request a voluntary remand when the error(s) should have been caught at the Appeals Council level, thus avoiding the time and expense of filing a civil action. We urge SSA to review the way that the agency handles litigation of court cases, since we believe that there are ways to lessen the workload impact on SSA and the courts and, most importantly, to avoid the delay for claimants. In many of these cases, claimants should not be required to appeal to the court level to obtain relief. As evidenced by the SSA and court statistics, a very large majority of claimants accept the outcome of Appeals Council review (under 20 percent appeal to court). As with the drop-off after initial denials, we believe there are many valid cases with errors that miss being corrected by the Appeals Council.

1. **Some commentators have suggested that appeals from the Appeals Council go to a specialized court of appeals, not to the federal district courts. This specialized appellate court might be modeled on the U.S. Court of Appeals for Veterans Claims, a court organized under Article I of the U.S. Constitution with exclusive jurisdiction to review benefits decisions of the Board of Veterans’ Appeals. What is NOSSCR’s position on this suggestion?**

**NOSSCR COMMENTS:**

For many years, NOSSCR has consistently opposed the creation of an Article I Social Security Court or Social Security Court of Appeals. We do not believe the creation of an Article I court is the most effective, efficient, or fair manner in which to accomplish the goal of creating a uniform body of law and providing justice to people with disabilities.

The federal courts have played a critical role in protecting the rights of claimants over several decades. The system overall has been well-served from having cases heard by regular, and not specialized, federal judges who hear a wide variety of federal cases. By adjudicating cases involving private parties, corporations, and other government agencies, federal district and circuit courts have a broad background against which to measure the reasonableness of SSA’s practices. In addition, questions of class action management and discovery are better handled by courts that are accustomed to these issues. Social Security cases do not involve issues for which technical expertise is needed or necessarily better.

From a claimant’s perspective, one must seriously question whether a specialized court limited to hearing Social Security claims would be as capable as the federal courts in objectively judging SSA. For instance, given the repetitiousness of issues, would the court become a rubber-stamp for agency action, jaded to individual facts or too accepting of questionable agency practices? It is important to remember that the Appeals Council failed to play a vigilant role when tens of thousands of beneficiaries had their benefits terminated in the 1980s.

**Would an Article I court relegate claimants to second-class citizenship in the federal court system?** While one stated reason for creating a specialized court is to ensure that similarly situated claimants are treated uniformly, the unintended result could be to create a second-class court system for Social Security claimants. Would the quality of applicants for judgeships be as high as we have come to expect for the federal court system? Would a court located in one location, e.g., Washington, DC, severely limit the access of low income persons with disabilities and elderly persons to the court? Under the current system, most claimants and their attorneys have relatively easy access to the courts. With a single court in one location, would they even be able to appear in court for an oral argument or other court hearing? Would the court be forced to forego oral argument altogether, as suggested by the question above, as has been the case with the Appeals Council?

Under the current system, the courts are readily accessible to all citizens and allow everyone, including low income and other disadvantaged individuals, an equal opportunity to be heard by judges of the high caliber we have come to expect in the federal system.

**High financial and administrative costs in creating a new court.** The financial cost of creating a specialized Social Security Court or Social Security Court of Appeals must be weighed against the questionable effectiveness of the court to achieve its stated objective. The court, if created, would involve expenditures for judges, staff, courthouse space, etc. Should limited resources be committed to that purpose instead of increasing staff at SSA, in hearing offices, and the state agencies? How would creation of the court affect the need for filling vacancies or expanding the current federal courts?

There also is the increased administrative cost by focusing on the end of the appeals process (through the creation of the new court) rather than on the front end of the process. Currently, when courts find that SSA failed to follow the law, the outcome on appeal is normally a remand to the agency for a new administrative hearing. In cases where the ALJ and Appeals Council again fail to follow the law, it is not unusual for a case appealed to court to be remanded yet again for a third or more hearings. If the case had been correctly decided and developed in the first place, this extreme delay for the claimant would be avoided, not to mention the cost of additional hearings.

1. **In addition to what the preceding questions ask for, does NOSSCR have any additional views on disability litigation in the federal courts that it believes we should know as we prepare our report?**

**NOSSCR COMMENTS:** We have no further comments.

**III. ASPECTS OF AGENCY PROCEDURE**

*While our study focuses on disability litigation in the federal courts, what happens within the agency has obvious significance for disability benefit claims once they reach district courts. Our interview subjects have consistently stressed that potentially problematic issues with decisions on claims should get addressed as early in the process as possible. If these issues are resolved at the ALJ level, district courts will have fewer cases to adjudicate and may remand fewer claims. The following questions involve decision-making at this level and are asked to help identify ways to reduce the number of appeals to district courts.*

1. **Has NOSSCR observed any trends in how ALJs decide disability claims over the past five years? If so, what are these trends, and are they positive or negative?**

**NOSSCR COMMENTS:**

The most significant change is the downturn in the ALJ allowance rate. Along with the almost 29 percent decrease in the ALJ allowance rate from 2009 (63 percent allowed) to 2014 (45 percent allowed), the Appeals Council fully favorable and remand rates have also decreased. This trend cannot be explained by changes in the number of applications for disability benefits; initial applications peaked in 2010 and have declined each year since. [[21]](#footnote-21) It is not surprising that as a significantly greater percentage of claimants are denied at the ALJ stage, the number of cases appealed to federal district court has increased. Although, it must be remembered that the vast majority of claimants accept the Appeals Council decision as the final action in their claims.

Fiscal Year ALJ allowance rate

2009 63%

2010 62%

2011 58%

2012 52%

2013 48%

2014 45%

Along with the significant decrease in the allowance rate, claimants are waiting much longer to receive a decision at the ALJ level. This is particularly distressing since the processing time, which had reached a record high national average of 532 days in August 2008, had been reduced to a national average low of 353 days at the end of FY 2012 in September 2012. However, the national average has increased since 2013 reaching 396 days at the end of FY 2013 in September 2013 and 422 days at the end of FY 2014 in September 2014. For the current fiscal year, the processing time continues to grow. In July 2015, the average processing time was 511 days, closing in on 1 ½ years and near the 532-day record high in 2008 that the agency tried hard to move away from.

What does this mean for appeals beyond the ALJ level? Will more requests for review be filed with the Appeals Council and more civil actions filed in federal court? While we understand that the focus of this ACUS report is not processing times, this is an important point to recognize. People with severe disabilities have been bearing the brunt of the backlog crisis. Behind the numbers are individuals with disabilities whose lives have unraveled while waiting for decisions – families are torn apart; homes are lost; medical conditions deteriorate; once stable financial security crumbles; and many individuals die.

Even with the significant decreases in favorable claims at the ALJ and Appeals Council levels, it is important to note that the federal court remand rate through these same years has decreased slightly, but not nearly as much as at the ALJ level:

Fiscal year Federal court remand rate Federal court allowance rate

2009 48% 4%

2010 47% 4%

2011 46% 3%

2012 45% 3%

2013 42% 2%

2014 43% 2%

We see the statistics as confirmation that errors continue to be made at the ALJ level that require correction.

1. **Several ALJs have suggested to us that claimant representatives could help ALJs prepare for hearings by guiding them to key medical evidence. One way to do so is to require claimant representatives to file short, 1-2 page statements identifying important medical evidence. Claimant representatives would file these statements a day or two before the hearing and could then amend them if additional records arrive at or after the hearing. These statements would not make any arguments but simply include enough descriptive information to enable ALJs to find and consider the pertinent pages in the records. Unrepresented claimants perhaps could be given a form asking simple questions about their physicians, to help them provide similar information. What are NOSSCR’s views on this possible reform?**

**NOSSCR COMMENTS:**

Whether or not to submit a pre-hearing brief should be left to the discretion of the individual ALJ. It is ordinary and routine for individual ALJs to request pre-hearing briefs and for representatives to submit, without prompting, such briefs of varying length and complexity depending on the facts of the particular case and the preference of the assigned ALJ. In fact, ODAR’s “Best Practices for Claimants’ Representatives” already includes submitting a “concise” pre-hearing brief “whenever possible.”[[22]](#footnote-22)

Currently, some ALJs do not review carefully or even consider at all a representative’s written submissions. Fewer yet rely on representatives’ factual summaries, even if provided.

In addition, who decides what is “important medical evidence”? What a representative considers “pertinent” may not seem important to the ALJ, and *vice versa.* Further, under the recently promulgated evidence submission regulations,[[23]](#footnote-23) claimants and their representatives must submit ***all*** evidence related to whether or not the claimant is disabled, both favorable and unfavorable, without regard to importance.

We also have concerns about imposing this requirement on unrepresented claimants who have no training in what is or is not important from a medical perspective. As noted above, it would be more productive for SSA to provide treating physicians with forms to submit substantive medical evidence relevant to the claimant’s case.

1. **Typically, a remand from the Appeals Council or federal court returns to the ALJ who rendered the initial decision from which the claimant appealed, at least if it is the first remand for the claim. Does NOSSCR believe that this first remand should return to the same ALJ, or should the claim go to a different ALJ on remand?**

**NOSSCR COMMENTS:**

We recommend that SSA change its policy so that a claim be assigned to a different ALJ after remand by the Appeals Council or the court.

Generally, the Hearing Office Chief ALJ (HOCALJ) assigns cases to ALJs on a rotational basis. Cases are not assigned on a rotational basis if “there is a special situation which requires a change in the order in which a case is assigned.” HALLEX I-2-1-55 A. Those “special situations” are listed in HALLEX I-2-1-55D. A question that frequently arises from our members is whether the case can be assigned to a different ALJ on remand because of their concern that the ALJ will be biased against the claimant and deny the claim yet again, resulting in more extensive delay for the claimant.

Remands from the Appeals Council or the court are considered a “special situation” where cases are not assigned on a rotational basis. HALLEX I-2-1-55D.11. A first remand will be assigned to the same ALJ who issued the decision or dismissal unless: (1) the case was previously assigned to that ALJ on a prior remand from the Appeals Council, or (2) the Appeals Council or the court directs that the case be assigned to a different ALJ. HALLEX I-2-1-55D.11.

Thus, the case will be assigned to a different ALJ only after the **second** Appeals Council remand, unless the Appeals Council orders otherwise. The ODAR policy that the case be assigned to the same ALJ “will not apply when the [Appeals] Council directs that the case be assigned to a different ALJ; e.g., it is determined that the claimant did not receive a full and fair hearing or it is a second remand.” HALLEX I-3-7-40 D.

While the requirement to assign the case to a different ALJ on a second remand is clear, it is possible to obtain assignment to a different ALJ by arguing that the claimant did not receive a full and fair hearing. A hearing will be considered “unfair because of prejudice, bias, or other misconduct on the part of the ALJ.” HALLEX I-3-1-25A. The allegation may be based on either on-the-record or off-the-record actions of the ALJ. The hearing must be audited if such allegations are involved. HALLEX I-3-1-25B.1*.*

“Off-the-record actions of the ALJ which may result in charges of unfair hearing can involve such things as intimidation, innuendo, attitude, facial expression, etc**.**” HALLEX I-3-1-25A. The hearing will be audited and the Appeals Council analyst will analyze the merits of the case and the allegation. If the allegation is not frivolous or insufficient on its face, a recommendation for action will be made. Even if the Appeals Council decides that the record in such a case supports remand for reasons unrelated to the unfair hearing allegation, the remand order may include an instruction that the case must be assigned to another ALJ. HALLEX I-3-1-25C.

Our members report that it is very difficult to obtain a remand to a new ALJ based on this provision. It can be extremely frustrating for the claimant to have his/her case remanded to the same ALJ, knowing that it is highly likely to be denied yet again. For instance, when the ALJ finds the claimant not credible at the first hearing, the same ALJ is likely to find the claimant not credible yet again at the remand hearing and deny the claim a second time. This can result in a delay of not just months but years. It is not unusual in cases involving a remand to last five years. If a second remand and two federal court appeals are involved, we have seen cases that have lasted ten years. Pending these appeals, the claimant’s health and financial conditions are likely to deteriorate.

1. **What other reforms might the SSA implement to reduce the number of problems with ALJ disability determinations and ultimately the number of claims appealed to the federal courts?**

**NOSSCR COMMENTS:**

We have numerous suggestions for improving the disability claims process for people with disabilities. We believe that these recommendations can go a long way towards reducing the disability claims backlog and making the process more efficient for all parties involved.

**1. Increase the time for hearing notices.** We recommend that the time for providing advance notice of the hearing date be increased from the current 20 days[[24]](#footnote-24) to 75 days. We believe that this increase will allow more time to obtain medical evidence before the hearing and make it far more likely that the record will be complete when the ALJ reviews the file before the hearing. The 75-day time period has been in effect in SSA’s Region I states since August 2006[[25]](#footnote-25) and, based on reports from representatives, has worked well.

**2. Improve development of evidence earlier in the process.**  We support initiatives to improve the process at the initial levels so that the correct decision can be made at the earliest point possible and unnecessary appeals can be avoided. Improvements at the front end of the process can have a significant beneficial impact on preventing the backlog and delays later in the appeals process. Inadequate case development at the DDS level means that ALJs will need to spend more time reviewing cases prior to the hearing. This leads to longer processing times at the hearing level. Our recommendations include the following:

• Provide more assistance to claimants at the application level regarding necessary and important evidence so that all impairments and sources of information are identified, including non-physician and other professional sources.

• DDS examiners should obtain necessary and relevant evidence. The DDSs generally do not use questionnaires or forms that are tailored to the specific type of impairment or ask for information that addresses the disability standard as implemented by SSA. This “language” barrier causes delays in obtaining evidence, even from supportive and well-meaning doctors.

• Electronic records, like paper records, need to be adapted to meet the needs of the SSA disability determination process. Many providers are submitting evidence electronically but these records are based on the providers’ needs and often do not address the SSA disability criteria.

• Increase reimbursement rates for providers. To improve provider response to requests for records, appropriate reimbursement rates paid by SSA for medical records and reports need to be established. Appropriate rates should also be paid for consultative examinations and for medical experts who testify at hearings.

• Provide better explanations to medical providers. SSA and DDSs should provide better explanations to all providers, in particular to physician and non-physician treating sources, about the disability standard and ask for evidence relevant to the standard.

• Provide more training and guidance to adjudicators.This training and guidance should focus on policies that are frequently misapplied, e.g., standards for weighing medical evidence, the role of non-physician evidence, evaluation of subjective symptoms, etc.

• Improve the quality of consultative examinations. Steps should be taken to improve the quality of the consultative examination (CE) process. There are many reports of inappropriate referrals and short perfunctory examinations. In addition, there should be more effort to have the treating physician conduct the consultative examination, as authorized by SSA’s regulations.[[26]](#footnote-26)

**3. Help claimants obtain representation earlier in the process to assist with development.** Representatives play an important role in obtaining medical and other information to support their clients’ disability claims and helping SSA to streamline the disability determination process. They routinely explain the process and procedures to their clients with more specificity than SSA. They obtain evidence from all medical sources, other treating professionals, school systems, previous employers, and others who can shed light on the claimant’s entitlement to disability benefits. Given the importance of representation, the Social Security Act requires SSA to provide information on options for seeking legal representation, whenever the agency issues a notice of any “adverse determination.”[[27]](#footnote-27) In reality, this statutorily required information is rarely provided.

Most representation occurs at the hearing level. A major reason is that it is only at that level, after the request for hearing is filed, that claimants are given concrete information regarding local and national resources to contact. However, many of our members represent claimants at the initial and reconsideration levels, in addition to the hearing level and beyond. They provide guidance with filing the initial application, obtaining medical evidence in support of the application, and assisting in filing the appeal if the initial application is denied.

Unfortunately, the rate of representation at the initial and reconsideration levels is extremely low when compared to the hearing level because little or no information about representation is provided that is specific or targeted to the area where claimants live. We also receive reports that claimants are in fact actively discouraged from obtaining representation by SSA claims representatives or telephone representatives.

Given the statutory requirement, we recommend that SSA include more information on options for representation in initial and reconsideration denial notices similar to that provided at the hearing level.

**4. Increase screening initiatives.** We support SSA’s efforts to accelerate decisions and develop new mechanisms for expedited eligibility throughout the application and review process, without sacrificing accuracy. We encourage the use of ongoing screening as claimants obtain more documentation to support their applications.

• **Expand use of existing methods of expediting disability determinations.** SSA already has in place a number of under-utilized procedures including Quick Disability Determinations, Compassionate Allowances, Presumptive Disability in SSI cases, and terminal illness (“TERI”) cases.

• **Senior attorney program and on-the-record decisions.**  This program allows senior staff attorneys to issue fully favorable decisions in cases that can be decided without a hearing, i.e., on-the-record. This cuts off many months in claimants’ wait for payment of benefits.

However, we have been concerned about that the large decrease in senior attorney decisions over the past few years has been a significant factor contributing to the increase in hearing level processing times and number of pending cases. Senior attorneys decided about 54,000 cases in FY 2010. By FY 2013, they decided only 18,625 cases and in FY 2014, the number spiraled down to 1,872. It appears that the number will drop even more in FY 2015, despite the surge in processing times and pending cases this year – Through the first 10 months of FY 2015, they decided only 508 cases.

Why the change? In 2013, SSA changed – and strictly limited – how cases were referred for decisions by senior attorneys. At that time, they could only review and issue fully favorable decisions in cases which have been selected by the “National Screening Unit” (NSU).

In April 2015, SSA made yet another change. It replaced the NSU with the “National Adjudication Team” (NAT), a virtual team of senior attorneys or “Attorney Advisors,” the official SSA term. The NAT centralizes ODAR’s Attorney Advisor function into a small, single group of adjudicators to screen cases to identify potential fully favorable decisions on-the-record decisions; prepare analyses for ALJs in those cases that are screened for the NAT but require a hearing; and issue legally sufficient fully favorable decisions on-the-record decisions in those cases supported by the evidence. NAT lead attorneys or designees will select and assign cases for screening by NAT AAs. These are the only cases that NAT AAs can review.

We hope that the senior attorney/Attorney Advisor program can be put to better use helping to process cases pending at the hearing level.

**CONCLUSION**

We appreciate the opportunity to participate in the study by responding to your questions. Please feel free to contact us if we can provide further information.

Sincerely,

Timothy Cuddigan, Esq.

President

Barbara Silverstone, Esq.

Executive Director

cc: Gisselle Bourns

1. Pub. L. No. 98-460, §§ 2 and 5, 98 Stat. 1794 (1984). [↑](#footnote-ref-1)
2. 56 Fed. Reg. 36932 (Aug. 1, 1991). [↑](#footnote-ref-2)
3. *Id.* at 36934. [↑](#footnote-ref-3)
4. 56 Fed. Reg. 57928 (Nov. 14, 1991). Prior to these regulations, SSA had failed to promulgate comprehensive rules for evaluation of symptoms. Under the policy in effect at the time, pain and other subjective symptoms, such as dizziness or numbness, were taken into account ***only*** if fully explained by laboratory or other diagnostic procedures. If not fully explained, debilitating pain, even where corroborated and credible, was discounted. [↑](#footnote-ref-4)
5. *See, e.g., Luna v. Bowen*, 834 F.2d 161 (10th Cir. 1987); *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984). [↑](#footnote-ref-5)
6. See, for example, 56 Fed. Reg. at 57932 (“We believe our policy, as expressed in these final rules, is consistent with circuit court rulings ….”). [↑](#footnote-ref-6)
7. *Perez v. Chater*, 77 F.3d 41 (2nd Cir. 1996). [↑](#footnote-ref-7)
8. *Wilkins v. Sec’y, Dept. of HHS*, 953 F.2d 93 (4th Cir.1991). [↑](#footnote-ref-8)
9. *E.g., Higginbotham v. Barnhart*, 405 F.3d 332 (5th Cir. 2005). [↑](#footnote-ref-9)
10. *E.g., Perks v. Astrue*, 697 F.3d 1086 (8th Cir. 2012); *Van Vickle v. Astrue*, 539 F.3d 825 (8th Cir. 2008*); Nelson v. Sullivan*, 966 F.2d 363 (8th Cir. 1992). [↑](#footnote-ref-10)
11. *E.g., Krauser v. Astrue*, 638 F.3d 1324 (10th Cir. 2011); *O’Dell v. Shalala*, 44 F.3d 855 (10th Cir. 1994). [↑](#footnote-ref-11)
12. *Mills v. Apfel*, 244 F.3d 1 (1st Cir. 2001). [↑](#footnote-ref-12)
13. *Matthews v. Apfel*, 239 F.3d 589 (3rd Cir. 2001). [↑](#footnote-ref-13)
14. *E.g., Bass v. McMahon*, 499 F.3d 506 (6th Cir. 2007); *Cotton v. Sullivan*, 2 F.3d 692 (6th Cir. 1993). [↑](#footnote-ref-14)
15. *E.g.,* *Eads v.Sec’y of the Dept. of HHS*, 983 F.2d 815 (7th Cir. 1993). [↑](#footnote-ref-15)
16. *Falge v. Apfel*, 150 F.3d 1320 (11th Cir. 1998), *cert. denied*, 525 U.S. 1124 (1999). [↑](#footnote-ref-16)
17. *Ramirez v. Shalala*, 8 F.3d 1449 (9th Cir. 1993). [↑](#footnote-ref-17)
18. *See Osenbrock v. Apfel*, 240 F.3d 1157, 1164 n.1 (9th Cir. 2000). [↑](#footnote-ref-18)
19. 20 C.F.R. §§ 404.1527(d)(2) and 416.927(d)(2). [↑](#footnote-ref-19)
20. SSR 96-7p, 61 Fed. Reg. 34485, clarifying 20 C.F.R. §§ 404.1529(b) and (c), 416.929(b) and (c). [↑](#footnote-ref-20)
21. <http://www.ssa.gov/OACT/STATS/dibStat.html>. [↑](#footnote-ref-21)
22. Section 2.12, <https://www.socialsecurity.gov/appeals/best_practices.html#&a0=1>. [↑](#footnote-ref-22)
23. 80 Fed. Reg. 14828 (Mar. 20, 2015). [↑](#footnote-ref-23)
24. 20 C.F.R. §§ 404.938(a) and 416.1438(a). [↑](#footnote-ref-24)
25. 20 C.F.R. § 405.315(a). [↑](#footnote-ref-25)
26. 20 C.F.R. § 404.1519h and 416.919h. [↑](#footnote-ref-26)
27. 42 U.S.C. § 406(c); 42 U.S.C. § 1383(d)(2)(D). [↑](#footnote-ref-27)