

# Reforming the Social Security Appeals Process

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by Pamela Villarreal and Laura Wiltshire

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*In 2015, about 12 million workers and their dependents received Social Security Disability Insurance (SSDI) benefits. While this is slightly fewer than the 12.1 million beneficiaries in 2014, beneficiary growth has averaged about 4 percent a year since 1990.*



Dallas Headquarters:  
14180 Dallas Parkway, Suite 350  
Dallas, TX 75254  
972.386.6272

[www.ncpa.org](http://www.ncpa.org)

Washington Office:  
202.830.0177  
[governmentrelations@ncpa.org](mailto:governmentrelations@ncpa.org)



## Executive Summary

Most claims are processed within three to five months. If the initial claim is denied, an applicant can appeal the decision. Once an appeal is filed, a reconsideration decision is made within about four months. Reconsideration involves review by another disability examiner and medical adviser team.

Some 900,000 claims were still awaiting final decisions in 2015:

- About 441,000 applications filed in 2014 were awaiting final decisions.
- Another 405,000 applications filed as far back as 2012 were still awaiting final disposition.
- A smaller number of claims filed earlier, from 2008 to 2011, had still not been finalized in 2015.

If a claim is denied on reconsideration, the claimant can request a hearing before an administrative law judge (ALJ). The ALJ has the option of granting or denying a hearing based on the evidence in the record. The average wait time for a hearing varies by location of the hearing office. For example, as of September 2016:

- In Fort Smith, Arkansas, the average wait for a hearing was 8 months.
- In Houston, Texas, the average wait was one year.
- In Buffalo, New York, Columbia, South Carolina, and Ponce, Puerto Rico, the average wait was over two years!

**Factors Influencing Award Rates.** Since 2000, award rates at all adjudicative levels for all claimants have trended downward, but the number of beneficiaries has grown, most likely as a result of the aging population. The majority of beneficiaries each year are 50 to 59 years of age; once awarded benefits, few claimants ever return to work.

In addition, since the early 1980s, new, relaxed criteria for determining disability status have opened the door to conditions

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that rarely constituted a disability in the past. These “nonexertionary” conditions are not associated with a diagnosable disease or injury. The two most common are mental disorders (nonintellectual disabilities, such as mood disorders) and some musculoskeletal conditions.

### **Appealing to an Administrative Law Judge.**

The success rate for claimants at the ALJ level depends on the state in which their appeal takes place. Approval rates also vary by individual judge within a state. For instance:

- Hawaii has only one office; of its six judges, all but one have approved benefits in over 50 percent of the cases presented to them.
- Maine has only one office, and its seven judges are split; three have approval rates below 50 percent and four have rates above 50 percent.
- In Kansas’ two offices, neither Topeka nor Wichita has a judge with an approval rate over 50 percent.

**Solutions.** Since the caseloads of administrative law judges vary significantly across the country, using a system of random assignment of cases to judges (regardless of the origin state

of the claim) could ease the backlog and mitigate variations based on the economic characteristics of each state. This would involve allowing claimants to present their cases remotely via videoconferencing. The Social Security Administration already does this when the claimant lives in a remote area and is physically unable to appear at a hearing.

A common complaint about an ALJ-level hearing is that the claimant is allowed to submit new evidence. The purpose of an appellate hearing should be to review existing evidence to correct errors or clarify interpretation of the law. New evidence should be reviewed at the reconsideration level only, or presented in a separate claim and evaluated at the initial determination level.

SSDI is the fastest growing component of the Social Security system, in terms of both cost and beneficiary growth. The Social Security Administration contributes to the cost growth by granting government’s highest paid employees (administrative law judges) the discretion to approve hundreds of thousands of dollars in denied claims per year. While an overhaul of the Social Security disability system is needed, interim changes to the appeals process would likely result in cost reductions and a quicker appeals process.

***Pamela Villarreal** is an NCPA expert on retirement, economic growth and tax issues. Villarreal has written studies and analyses on specific economic and retirement topics such as minimum wage effects, the jobs market, returns on stock and bond investments, retirement account reforms and the NCPA’s state tax calculator. She has authored and coauthored numerous publications on diverse topics such as capital gains taxes, reverse mortgages, Social Security disability and baby boomers’ spending habits. One of her studies, “Wealth, Inheritance and the Estate Tax,” was coauthored with noted economist Jagadeesh Gokhale.*

*Villarreal’s work on the NCPA’s 401(k) borrowing calculator and the negative consequences of borrowing from a 401(k) has been recognized by media throughout the country. Among those was Kathy Kristof, the award-winning personal finance columnist with the Los Angeles Times.*

*Villarreal routinely shares her insight with media outlets throughout the country. Her work has been covered by FOX Business News, CNBC, Forbes, Bloomberg, USA Today, Money Magazine and Washington Times. She is a much in demand speaker on retirement and tax issues.*

***Laura Wiltshire** is a research associate with the National Center for Policy Analysis.*

## Introduction

In 2015, 12 million individuals and their dependents received Social Security disability (SSDI) benefits.<sup>1</sup> While this number is slightly lower than the 12.1 million beneficiaries in 2014, beneficiary growth has averaged about 4 percent a year since 1990. Additionally, there are several hundred thousand applicants awaiting decisions on their claims. In 2015, nearly 900,000 claims were pending, almost double the number of pending claims from 2012. Government reports and academic studies show that appealed claims caseloads and approval rates vary widely from state to state and from one administrative law judge to another, and that many claims are approved or denied incorrectly. What can be done to facilitate the appeals process and reduce the cost of appeals to both claimants and taxpayers?

### Statistics on the SSDI Program

In 2015 (the most recent data available), workers accounted for 87 percent of beneficiaries: the remainder were spouses and dependents of disabled workers, or adult disabled children.<sup>2</sup> The average beneficiary was 54 years of age, and the average monthly benefit was \$1,165.<sup>3</sup> The top diagnoses for disability recipients have changed markedly over the past several decades due to changing criteria for disability determinations and medical advancements in diagnosis and treatment:

- In 1960, diseases of the circulatory system were the leading disability diagnosis (27 percent), followed by nervous system and sensory organ disorders (15 percent) and neoplasms (tumors), at 8.5 percent. Musculoskeletal disorders and mental disorders were only 8.2 and 8.3 percent of diagnoses, respectively.<sup>4</sup>
- In 2015, the leading diagnoses were musculoskeletal disorders (32 percent), mental disorders (27 percent), and other impairments (17 percent) not related to any major medical categories [see Figure I].

Also, the aging baby boomer population and the prevalence of women in the labor force has contributed to growing numbers of individuals claiming disability, particularly since the mid-1980s. At that point, the first-born of working baby boomers (born from 1946 to 1964) were around age 40, at

which there is generally a marked increase in those self-reporting a disability that prevents them from working or limits their ability to work.<sup>5</sup>

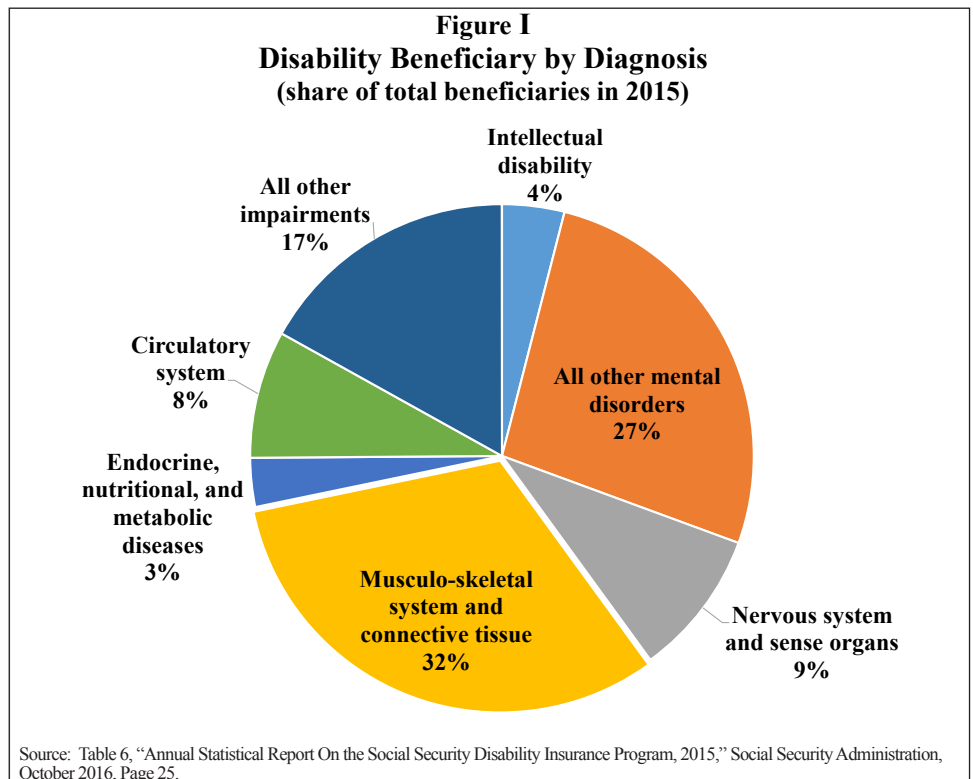
### Geographic Distribution of Disabled Beneficiaries.

As of December 2015, 4.7 percent of the nation's working age population (18 to 64 year olds) received payments from Social Security Disability or Supplemental Security Income (SSI). Supplemental Security Income is paid to disabled adults and children who have limited resources and who may have not worked enough in their lifetimes to qualify for SSDI.<sup>6</sup> A handful of mostly southern states have the highest share of disability beneficiaries:<sup>7</sup>

- Disabled beneficiaries make up more than 7 percent of the working age population in Arkansas, Mississippi, Alabama, West Virginia, Kentucky and Maine.
- In contrast, disabled beneficiaries make up less than 3 percent of the working age population in Alaska and Hawaii — the states with the lowest disability rates.
- States with higher disability rates tend to have populations that are less educated, older and more blue-collar than other states, and have fewer immigrants.<sup>8</sup>

### The Disability Application Process

To qualify for disability, workers must have enough Social Security disability credits based on their time



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in the workforce. The minimum number of credits required increases with age from six credits at age 23 to 40 credits at age 62. Older workers must have earned most of their credits within the recent past. A nondisabled individual can lose eligibility for the program after 10 years out of the labor market, and must work additional years to regain the necessary number of credits.<sup>9</sup>

**Application and Determination Process.** A claims examiner from a Social Security field office or a state-level disability services office investigates each applicant's medical history. If the claimant has not recently seen his or her own physician, the examiner may also require an examination by an independent physician chosen by the Social Security Administration. The application is reviewed by the disability examiner and a medical adviser. Most claims are processed within three to five months. If a claim is approved, benefit payments begin the sixth month from the date the disability began.<sup>10</sup> If the initial claim is denied, an applicant can file a written appeal within 60 days.

Once an appeal is filed, a reconsideration decision is made within about four months.<sup>11</sup> The reconsideration is reviewed by another disability examiner and medical adviser team. If the reconsideration is denied, the claimant can request a hearing before an administrative law judge (ALJ). The ALJ has the option of granting or denying a hearing based on the claimant's evidence in the record. If a hearing is denied, or the claim is denied after the ALJ grants a hearing, the claimant can go to an Appeals Council, which will either make a determination or send the case back to the ALJ.

Lastly, the claimant can file a lawsuit against the Social Security Administration.<sup>12</sup>

At the ALJ level, 80 percent of claimants are represented by a lawyer, friend or relative.<sup>13</sup> Disability attorneys' fees are regulated by federal law, which allows them to make 25 percent of disability retroactive pay, or a maximum of \$6,000 paid by the Social Security Administration.<sup>14</sup> The costs may exceed this, with out of pocket fees of up to \$200 for copies and mailing supplies, or if cases go to an appeals court or federal court.<sup>15</sup> However, even the most basic fees are only charged if the claim is successful.<sup>16</sup>

From 2000 to 2009, only 28 percent of applicants were initially awarded benefits. About 3 percent were awarded benefits on reconsideration and 13 percent were awarded benefits after a hearing.<sup>17</sup> While the appeals process improves the chances of an approval, it also increases delays.<sup>18</sup> The average wait time for a hearing varies by location of the hearing office. For example, as of September 2016 [see Figure II]:<sup>19</sup>

- In Fort Smith, Arkansas, the average wait time was 8 months.
- In Houston, Texas, the average wait time was one year.
- In Buffalo, New York, Columbia, South Carolina, and Ponce, Puerto Rico, the average wait time was over two years!

According to the *Annual Statistical Report on the Social Security Disability Insurance Program*, 900,000 claims were still awaiting final decisions in 2015:<sup>20</sup>

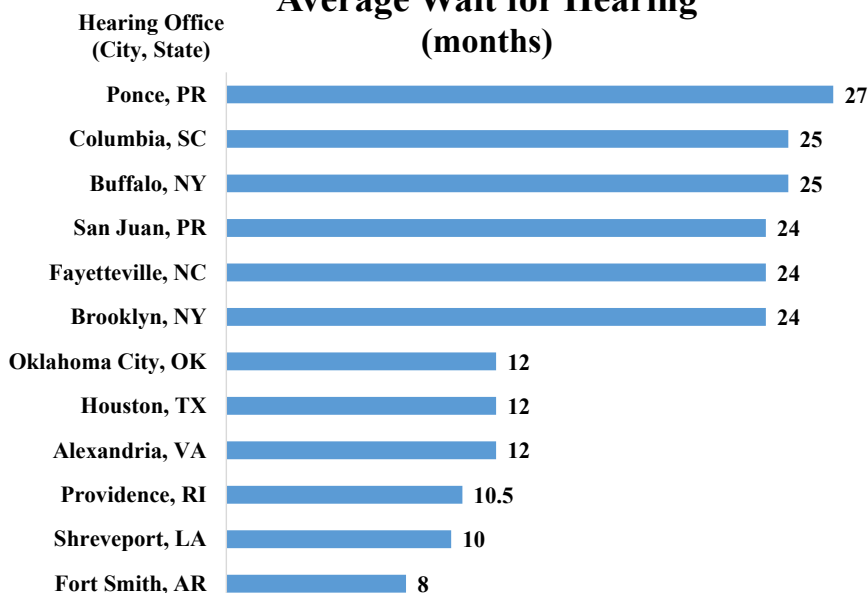
- About 441,000 applications filed in 2014 were awaiting final decisions.
- Another 405,000 applications filed as far back as 2012 were still awaiting final decisions.
- A smaller number of claims filed earlier, from 2008 to 2011, had still not been finalized in 2015.

### Factors Influencing Award Rates.

Award rates at the initial determination level appear to be influenced by a number of factors, including geographic location, caseload and political climate. Since 1960, aggregate disability award rates (fraction of awards made in that year divided by the number of applications) have ranged from a low of 29 percent in 1982 to 56.1 percent in 2000.<sup>21</sup> What could account for the dramatic variations in award rates over the past 40 years?

Since 2000, award rates at all adjudicative levels for all claimants (including dependents)

**Figure II**  
**Average Wait for Hearing**  
**(months)**



Source: Average Wait Time Until Hearing Held Report (For the Month of September 2016), Social Security Administration.



have trended downward, but the number of beneficiaries has grown, most likely as a result of the aging population. The majority of beneficiaries each year are 50 to 59 years of age; the share of beneficiaries in this age group has increased slightly since 1992. Once awarded benefits, few claimants ever return to work.

Also, since the early 1980s, new, relaxed criteria in determining disability status have opened the door to conditions that rarely constituted a disability in the past. These “nonexertionary” conditions are not associated with a diagnosable disease or injury. The two most common are mental disorders (nonintellectual disabilities, such as mood disorders) and some musculoskeletal conditions.<sup>22</sup> Since these conditions can affect anyone of any age and are now the two most common, they likely explain why the average age of newly awarded beneficiaries has fallen over several decades: for males, from 54.5 years in 1960 to 49.5 years in 2010 and for females, from 52.5 years in 1960 to 48.8 years in 2010.<sup>23</sup>

**Nondemographic Factors.** A Harvard University study found that initial determinations by state-level bureaucracies vary widely in a manner that is difficult to attribute to differences in the applicant pool. Using monthly workload data collected by the Social Security Administration for 155 months (October 2000 to August 2013), author Dan Honig measured the effect of state-level demographic and political variables on approval rates.<sup>24</sup> Other variables, such as state expenditures as a share of state revenue and Medicaid costs per capita, were statistically significant, but only when measured in the absence of the political variables. The study found:<sup>25</sup>

- States with higher Medicaid costs per capita were associated with lower claim approval rates for SSDI.
- States with higher annual expenditures as a share of revenue had higher SSDI approval rates.
- However, adding a variable for state governors’ political affiliation, Honig found that states with Democratic governors were associated with higher approval rates of SSDI applications, suggesting that bureaucratic supervisors’ parties are likely to make an impact on disability determinations.

Honig’s research suggests that there is political bias in the initial determination process. The reason? Initial determinations are made by Disability Determination

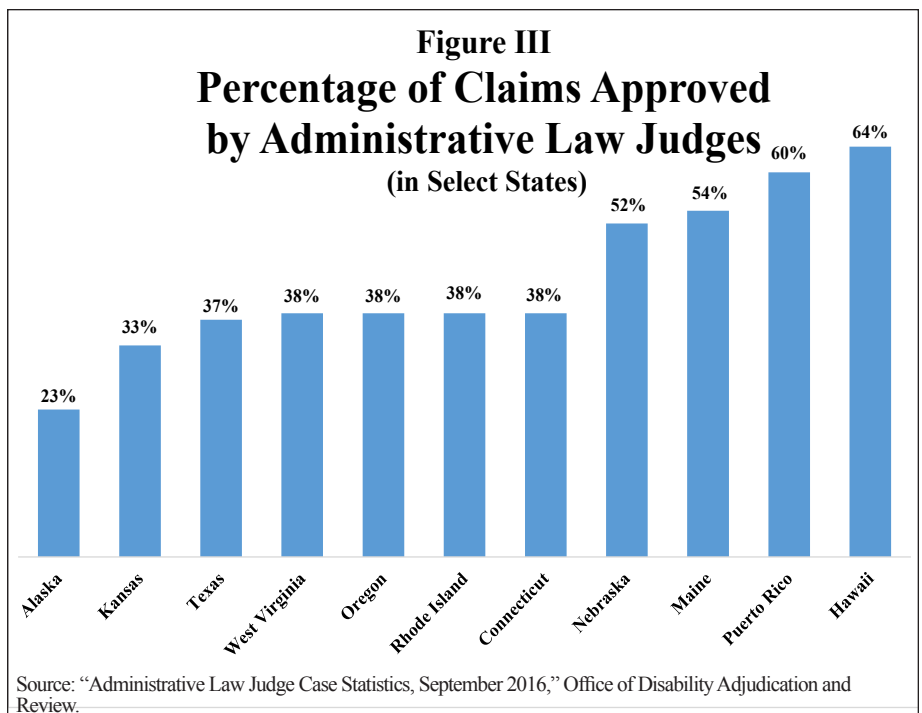
Services, which are run by the individual states and employ state workers who follow federal SSDI guidelines. Applicants obviously have little control over this, but the initial determination is not the end of the road. In fact, most initial denials are appealed.

### Social Security and Administrative Law Judges

Thirty different federal agencies employ administrative law judges. They are selected by the Office of Personnel Management and hired by the agencies themselves. They must be licensed attorneys with a minimum of seven years’ experience in litigating, participating in and/or reviewing formal hearings at the local, state or federal level. The Social Security Administration employs about 1,500 ALJs, more than any other agency, at an average salary of \$159,000.<sup>26</sup> To avoid agency influence on ALJs, they cannot report to any person in their agency performing investigative or prosecutorial functions for the agency.<sup>27</sup> Judges can be removed with “good cause,” but this definition has been interpreted very narrowly and usually applies to egregious behavior. Only on rare occasions has an administrative law judge been removed.<sup>28</sup> Furthermore, there is no mandatory retirement age for federal judges, so they could remain on the bench for decades.<sup>29</sup>

#### Appealing to an Administrative Law Judge.

While there may be some state-level bias in the initial determination process, the success rate for claimants at the ALJ level really depends on the state in which their appeal takes place [see Figure III]:



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- As of September 2016, the states and territories with the highest approval rates among administrative law judges were Hawaii (64 percent), Puerto Rico (60 percent), Maine (54 percent) and Nebraska (52 percent).<sup>30</sup>
- The states with the lowest approval rates were West Virginia, Oregon, Rhode Island, and Connecticut all at 38 percent, Texas (37 percent), Kansas (33 percent) and Alaska (23 percent).<sup>31</sup>

Approval rates also vary by individual judge within a state. For instance, Hawaii has only one office; of its six judges, all but one have approved claims in over 50 percent of the cases presented to them.<sup>32</sup> Maine has only one office, and its seven judges are evenly split; three have approval rates below 50 percent and four have rates above 50 percent. In Kansas' two offices, one in Topeka and one in Wichita, neither office has a judge with an approval rate over 50 percent.<sup>33</sup>

Puerto Rico has an abnormally high approval rate at 60 percent.<sup>34</sup> This is potentially a result of the “language skills” portion of the medical-vocational grid used to measure an applicant’s ability to function in the workplace. The grid also takes into account indirect vocational factors, such as education level, years until retirement, language and previous work skills. The inability to speak English is a qualifying circumstance in disability determination. Thus, non-English speakers in Puerto Rico are given priority in the disability matrix as a result of their typically more limited job prospects, even though Spanish is a common language there.<sup>35</sup>

Researchers Robert Nakosteen and Michael Zimmer reviewed three years’ worth of ALJs’ decisions in a recent study on the outcomes of various claims across the United States.<sup>36</sup> Since the rate of approvals varies widely from judge to judge, Nakosteen and Zimmer wanted to look at potential factors that explain the variation. They included variables that could explain the state-level differences among judges, such as state unemployment rates, percentage of people in the state over age 65, percent of population receiving disability and the median income of the state’s residents. They also included individual characteristics of the judges, such as age, gender, years of experience and a scaled measure of leniency. All of these characteristics were modeled on two dependent variables: number of decisions rendered and reversal rate of previous denials to benefit claims. From 2010 through 2012, they found:<sup>37</sup>

- The volume of decisions per judge (which averaged 407 per year), was positively correlated with the leniency of the judge and the proportion of decisions resulting in the approval of benefits, but negatively correlated with the state’s unemployment rate, median income and percentage of the population aged 65 and over.
- The approval rate of benefits per judge (reversal rate) was positively correlated with the state’s unemployment rate, the experience of the judge (in years) and the state’s governor being a Democrat.

A key finding of Nakosteen and Zimmer was that “judges with a history of leniency tend to generate greater volumes of decisions” even after controlling for state-level variables such as age, disability rates and median income.<sup>38</sup>

Do judges’ decisions ultimately reflect the applicant’s true disability status? Authors Hugo Benitez-Silva, Moshe Buchinsky and John Rust compared disability applicants’ self-reported disabilities to their ultimate award decisions (after appeals). Using Health and Retirement Study (HRS) survey data from 1992 to 1996, they examined the self-reported disability status of those who had applied for disability during that period and compared it to the outcome of their claims.<sup>39</sup> They found that 20 percent of beneficiaries who were ultimately awarded benefits *were not* disabled — according to their self-reported status — and 60 percent of those who *were* denied benefits were disabled.

Evidence on the outcomes of administrative law judges and what influences their decisions suggests that the appeals process at the hearing level is slow, subjective and unfair to claimants in some states. It is also costly for the taxpayers who must fund this process.

### Solutions

The Social Security Disability system is in need of significant reforms — not just in the determination and appeals process, but also in how benefits are paid. The NCPA has previously recommended self-funded accounts with top-up contributions (similar to the Chilean system). But short of an overhaul of the system from a completely taxpayer-funded program to a self-funded personal system, two reforms could, at a minimum, increase the incentives of partially disabled beneficiaries to participate in the labor force to the degree they are able. The first is assigning a rating system to disabilities that would result in partial payments for those who have less progressive or nondegenerative conditions.

The other recommendation is to lift the income cap for those receiving benefits who wish to work in some capacity. (See our previous NCPA report on

these recommendations.)<sup>41</sup> The types of reforms that increase work incentives and give applicants more “skin in the game” will be the most effective at controlling long-term costs of the program and increasing the participation rate of disabled people in the workforce.

There are also possible solutions for the appeals process in combination with these reforms or under the status quo.

**Random Assignment of Cases via Videoconferencing.** Since caseloads of administrative law judges vary significantly across the country, using a system of random assignment of cases to judges (regardless of the origin state of the claim) could ease the backlog and mitigate biases based on the economic characteristics of each state. This would also eliminate the tendency to “judge shop” and reduce the caseload bias toward lenient judges.<sup>42</sup> Of course, this would involve allowing claimants to present their cases remotely via videoconferencing. The Social Security Administration already does this in cases where the claimant lives in a remote area and is physically unable to appear at a hearing. The Representative Video Project (RVP) was authorized in 2011 and allows representatives and claimants to use “agency-approved video equipment” for remote hearings.<sup>43</sup>

Videoconferencing has become more commonly used in the legal field and government for immigration hearings, remote witnesses, appellate cases and employment interviews. But skepticism remains over whether courtroom participants would treat a video image the same as if the person were physically present in the courtroom. According to Chancellor Professor Frederic Lederer of the College of William and Mary, various experiments with witness testimony via teleconferencing have been conducted as part of William and Mary’s Courtroom 21 Project. They have found that remote testimony has been treated no differently by courtroom participants than “in person” testimony, provided that the video image is life-size.<sup>44</sup>

**Term Limits for Administrative Law Judges.** Earlier this year, the Office of Personnel Management and the Office of Management and Budget put forth a request to Congress to amend the Administrative Procedure Act. *The Administrative Law Judge Term Appointment Act of 2016* would allow agencies to hire short-term (one to four years) ALJs as needed to handle case backlogs. However, Thomas Sussman of the American Bar Association decried the measure, alleging that four-year terms are too short for anybody to seriously consider the job. Further, he argues that

the move would compromise judicial independence. This specific measure has not moved forward in Congress, but there is a case to be made for term limits. The Mercatus Center recommends 15-year term limits that would bring fresh perspectives to the bench and would prevent judges from becoming rubber stamps for the appeals process.<sup>45</sup>

**Limit the Submission of New Evidence at the ALJ Level.** A common complaint about an ALJ-level hearing is that the claimant is allowed to submit new evidence. In most cases, new evidence must be presented within 10 days after filing for a hearing. However, the purpose of an appellate hearing should not be to consider new evidence. It should be for what appeals courts are designed to do — review existing evidence to correct errors or clarify interpretation of the law. New evidence gathered within three months should be reviewed at the reconsideration level only. Any evidence obtained after a three-month period should be presented in a separate claim and evaluated at the initial determination level.

## Conclusion

The Social Security Disability Insurance system is the fastest growing component of Social Security benefits, in terms of both costs and number of beneficiaries. The Social Security Administration contributes to the cost growth by granting government’s highest paid employees (administrative law judges) the discretion to approve hundreds of thousands of dollars in denied claims per year. While an overhaul of the Social Security disability system is needed, interim changes to the appeals process would likely result in reduced costs and a speedier appeals process.

## Notes

1. *Annual Statistical Report on the Social Security Disability Insurance Program, 2015*, Social Security Administration, SSA Publication No. 13-11826, October 2016.
2. Ibid.
3. Ibid.
4. *Annual Statistical Report on the Social Security Disability Insurance Program, 2005*, Social Security Administration, SSA Publication No. 13-11826 Released: September 2006.
5. “Growth in New Disabled-Worker Entitlements, 1970 – 2008,” Social Security Office of Retirement and Disability Policy.
6. SSI is a much smaller part of the overall Social Security system and will not be addressed in this paper.
7. *Annual Statistical Report on the Social Security Disability Insurance Program, 2015*.
8. Kathy A. Ruffing, “Geographic Pattern of Disability Receipt Largely Reflects Economic and Demographic Factors,” Center on Budget and Policy Priorities, January 9, 2015.



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9. “Benefits Planner: Social Security Credits,” available at [www.ssa.gov](http://www.ssa.gov).
10. The disability onset date is usually determined by the applicant but should be supported by medical evidence.
11. “If You’ve Been Denied,” National Organization of Social Security Claimants’ Representatives.
12. Erica Woehl, “Social Security Administration Disability Discrepancies: The Debate Between Street-Level Bureaucrats and Administrative Law Judges,” University of North Dakota, 2015.
13. David Morton, “Social Security Disability: Appealing Denied Claims,” Nolo.
14. Aaron Hotfelder, “When to Talk to a Social Security Disability Lawyer,” Nolo.
15. Ibid.
16. Ibid.
17. “Chart 11: Final outcome of disabled-worker applications, 1999–2009,” *Annual Statistical Report on the Social Security Disability Insurance Program, 2014*.
18. Hugo Benitez-Silva et al., “An empirical analysis of the social security disability application, appeal, and award process,” *Labour Economics*, Vol. 6, Issue 2, June 1999, pages 147-178.
19. “Average Wait Time Until Hearing Held Report,” Social Security Hearings and Appeals. Available at [www.ssa.gov](http://www.ssa.gov).
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21. *Annual Statistical Report on the Social Security Disability Insurance Program, 2000*, and the *Annual Statistical Report on the Social Security Disability Insurance Program, 2014*, Social Security Administration, SSA Publication No. 13-11826, November 2015, and Hugo Benitez-Silva, Moshe Buchinsky and John Rust, “How Large are the Classification Errors in the Social Security Disability Award Process?” National Bureau of Economic Research, Working Paper No. 10219, January 2004.
22. While it is true that intellectual disabilities and schizophrenia are relatively easy to diagnose, mood disorders, a fast-growing subcategory of mental disorders, are based on a patient’s self-reported symptoms, and open to interpretation by the physician.
23. “Disability Chartbook,” Social Security Advisory Board.
24. Dan Honig, “Denied Disability? Try Another State: Discretion and Inequality in Eligibility Determination of US Federal Disability Programs,” unpublished, December 15, 2013.
25. Ibid.
26. Vanessa K. Burrows, “Administrative Law Judges: An Overview,” Congressional Research Service, Report 7-5700, April 13, 2010.
27. Ibid.
28. Ibid.
29. Administrative law judges participate in the Federal Employees Retirement System (FERS) which has three components: Social Security, the Basic Benefit (a defined benefit) and the Federal Thrift Savings Plan (a defined contribution plan similar to a 401(k) plan).
30. “Administrative Law Judge Case Statistics,” Office of Disability Adjudication and Review.
31. Ibid.
32. Ibid.
33. Ibid.
34. Ibid.
35. Mark A. Warshawsky and Ross A. Marchland, “Modernizing the SSDI Eligibility Criteria: A Reform Proposal That Eliminates the Outdated Medical-Vocational Grid,” Mercatus Center of George Mason University, April 2015.
36. Robert Nakosteen and Michael Zimmer, “Approval of Social Security Disability Appeals: Analysis of Judges’ Decisions,” *Applied Economics*, 2014, Vol. 46, No. 23, pages 2783-2791.
37. Ibid.
38. Ibid.
39. Hugo Benitez-Silva, Moshe Buchinsky and John Rust, “How Large are the Classification Errors in the Social Security Disability Award Process?” National Bureau of Economic Research, Working Paper No. 10219, January 2004. Benitez-Silva et al., assume that respondents participating in the HRS survey were being truthful about their disability status due to the confidentiality of the survey data. An example they use is that 18 percent of those who reported receiving SSDI or SSI income also reported that their disability did not prevent them from working entirely.
40. Ibid.
41. Pamela Villarreal, “Not All Disabilities Are Alike: Implementing a Rating System for SSDI,” National Center for Policy Analysis, Policy Report No. 366, June 2015.
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43. “Representative Video Project,” Social Security Administration, CJB 11-04, August 17, 2011.
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